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FOR

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# 1934.

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THE

# LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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## HOUSE OF LORDS,

## JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

## PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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| Privy Council . . . . | A. M. TALBOT, | *Barrister-at-Law.* |

1934.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET,
LONDON, W.C.1,
AND
PRINTED BY WATERLOW & SONS LIMITED, LONDON WALL, LONDON.

BIBL.
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# JUDGES, LAW OFFICERS, ETC.

## MEMORANDA.

1934.

*Jan.* 1. THE RIGHT HON. LYMAN POORE DUFF, LL.D., *Chief Justice of Canada, a member of the Judicial Committee of the Privy Council, received the honour of G.C.M.G.*

*Jan.* 4. THE RIGHT HON. SIR LANCELOT SANDERSON, K.C., *was appointed to the office of one of the members of the Judicial Committee of the Privy Council in the place of the Right Hon. Sir George Rivers Lowndes, K.C.S.I., K.C., who had retired.*

*Jan.* 10. SIR FREDERIC HERBERT MAUGHAM, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Lord Justice Lawrence, resigned.*

*Jan.* 10. CHARLES STAFFORD CROSSMAN, ESQ., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, and was afterwards knighted.*

*Feb.* 24. THE RIGHT HON. RUFUS DANIEL, MARQUESS OF READING, G.C.B., G.C.S.I., G.C.I.E., G.C.V.O., *was granted the office of Constable of His Majesty's Castle of Dover and also the office of Warden and Keeper of His Majesty's Cinque Ports, together with the office of Admiralty within the said Cinque Ports, in the room of the Right Hon. William, Earl Beauchamp, K.G., K.C.M.G., resigned.*

*Feb.* 26. *This day* SIR FREDERIC HERBERT MAUGHAM, *Lord Justice of Appeal, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

*Apr.* 26. *This day* THE RIGHT HON. SIR DINSHAH FARDUNJI MULLA, C.I.E., *a member of the Judicial Committee of the Privy Council, died at Bombay, aged* 65.

*May* 3. SIR LEWIS TONNA DIBDIN, D.C.L., *having resigned the office of Dean of the Court of Arches,* SIR PHILIP WILBRAHAM BAKER-WILBRAHAM *was appointed in his place.*

*May* 24. *This day* THE RIGHT HON. VISCOUNT SUMNER OF IBSTONE, G.C.B., *lately a Lord of Appeal, died very suddenly in London, aged* 75.

*May* 31. THE RIGHT HON. SIR SHADI LAL *was appointed to be a member of the Judicial Committee of the Privy Council in the place of the late Sir Dinshah Fardunji Mulla, C.I.E., who had retired.*

*June* 6. *This day* SIR MAURICE HILL, *lately a judge of the High Court (Probate, Divorce, and Admiralty Division), died at his home at Wimbledon, in his* 73*rd year.*

*June* 29. *This day* THE RIGHT HON. SIR SHADI LAL, *having been already appointed a member of His Majesty's Most Honourable Privy Council, made affirmation, and, by His Majesty's command, took his place at the Board accordingly.*

1934.

*June* 29. THE RIGHT HON. ROBERT ALDERSON, BARON WRIGHT (*Lord of Appeal in Ordinary) was appointed to be a Member of the Universities Committee of the Privy Council, in accordance with the provisions of the Universities of Oxford and Cambridge Act,* 1877.

*Aug.* 18. *This day* THE RIGHT HON. SIR THOMAS EDWARD SCRUTTON, P.C., *Lord Justice of Appeal, died suddenly, after a short illness, at a nursing home, Norwich, in his* 78*th year.*

*Sept.* 21. COLONEL SIR HENRY DAVIS FOSTER MACGEAGH, K.B.E., T.D., K.C., *was appointed to be His Majesty's Judge Advocate General in the place of Sir Felix Cassel, Baronet, K.C., who had retired.*

*Oct.* 3. SIR ALEXANDER ADAIR ROCHE, *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Lord Justice Scrutton, deceased.*

*Oct.* 12. THE HON. SIR EDWARD ACTON *resigned his appointment as a Justice of His Majesty's High Court of Justice, King's Bench Division.*

*Nov.* 6. JOHN EDWARD SINGLETON, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

*Nov.* 6. SAMUEL LOWRY PORTER, ESQ., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

*Nov.* 9. *This day* SIR ALEXANDER ADAIR ROCHE, *Lord Justice of Appeal, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

# ERRATA.

| *Page* | *Line* | *For* | *Read* |
|---|---|---|---|
| 462 | 16 | (3) | (1) |
| | 7 from bottom | after " the true facts " insert (3) | |
| 512 | 9 | Act 2 of 1932 | Act 2 of 1933 |
| 518 | footnote (1) | [1932] A. C. 562 | [1932] A. C. 526 |

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1934, will be as follows :—

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[1934] 1 K. B. [1934] 2 K. B. [1934] P.

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# Appeal Cases

BEFORE

# THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

# THE JUDICIAL COMMITTEE

OF

# HIS MAJESTY'S MOST HONOURABLE
# PRIVY COUNCIL.

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[HOUSE OF LORDS.]

H. L. (Sc.)*
1933
July 10.

LOCHGELLY IRON AND COAL COMPANY, LIMITED . . . . . . . . APPELLANTS;

AND

M'MULLAN . . . . . . . . . . . . . RESPONDENT.

*Master and Servant—Injury to Servant—Death from Injury—Action by Father for Solatium and patrimonial Loss—Action arising out of and in Course of Employment—Coal Mine—Failure to support Roof—Breach of Statutory Duty—Workmen's Compensation—" Personal Negligence or Wilful Act"—Coal Mines Act,* 1911 (1 & 2 *Geo.* 5, *c.* 50), *s.* 49—*Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 29.

By s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925: " When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD THANKERTON, LORD MACMILLAN, and LORD WRIGHT.

H. L. (Sc.)
1933
LOCHGELLY IRON AND COAL CO.
*v.*
M'MULLAN.

injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The pursuer in an action under the Common Law of Scotland claimed damages for the death of his son, a miner lately in the employment of the appellants. The pursuer averred that, in breach of s. 49 of the Coal Mines Act, 1911, which provides that the roof of every working place shall be made secure and that a person shall not (with an immaterial exception) work in any working place which is not so made secure, his son was ordered or permitted to work in a working place where the roof had not been made secure, and that, while he was there at work, part of the roof fell and killed him.

*Held*, that these averments disclosed a case of "personal negligence of the employers" within the meaning of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and that the action was competent.

*Rudd v. Elder Dempster & Co.* [1933] 1 K. B. 566, in so far as it is to the contrary, disapproved.

Interlocutor of the Second Division of the Court of Session, 1933 S. C. 235, affirmed.

APPEAL from an interlocutor pronounced by the Second Division of the Court of Session (1) in an action in which the pursuer, John M'Mullan, claimed 600*l*. as reparation for loss, injury and damage suffered by him through the fault of the defenders, the Lochgelly Coal and Iron Co., Ld., which caused the death of his son Edward.

The pursuer's condescendence No. 2 alleged as follows :—

On January 27, 1932, Edward M'Mullan was employed by the defenders as a miner at their Dora Pit, Cowdenbeath. He with another miner, Archibald Thomson, was working in a seam called the Fourteen Feet Coal by the method known as "stoop and room." Some years ago "rooms," or roads, had been driven at right angles to each other through the main seam, leaving square "stoops," or pillars of coal, about 66 ft. thick. These stoops were being gradually removed by stripping "lifts," or slices, from them.

As "stoops" are being removed in the way described above, props are inserted to support the roof.

At the time of the accident Edward M'Mullan and his companion, Thomson, were working beside a stoop of which only a small portion remained. They were removing the head coal above a room adjoining the stoop. The props supporting the adjacent roof where the lifts had been removed had been withdrawn on the night before the accident.

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(1) 1933 S. C. 235.

While Edward M'Mullan was engaged in placing a prop at the place where he was working, the roof collapsed and fell upon him and killed him.

The pursuer relied on ss. 37, 49, 50 and 52 of the Coal Mines Act, 1911 (1), but principally on s. 49, which provides that "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure." He contended that it was the duty of the defenders under s. 49 to employ a method of working which should provide for the maintenance at all times in a secure condition of the roof under which the deceased man was working at the time of the accident; that it was also their duty under ss. 50 and 52 to have the roof adequately supported by props or efficient temporary supports while work was being done thereunder or in the neighbourhood thereof, or else to refrain altogether from carrying on operations there, and to fence off the workings as provided by s. 37. He insisted that the defenders had failed in all these duties, and, by their failure to observe them, had caused the death of Edward M'Mullan.

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(1) Coal Mines Act, 1911, s. 37, sub-s. 1: "Every entrance to any place below ground in a mine which is not in actual use or course of working or extension shall be kept securely fenced across the whole width of the entrance, so as to prevent persons inadvertently entering the same."

Sub-s. 2: "The top of every shaft which for the time being is out of use, or used only as a ventilating shaft, shall be kept securely fenced."

Sub-s. 3: "The top and bottom of every working, ventilating, or pumping shaft, and all entrances into the workings therefrom, shall be kept securely fenced, but this shall not be taken to forbid the temporary removal of the fence for the purpose of repairs or other operations if proper precautions are used."

Sect. 49: "The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

Sect. 50, sub-s. 1: "Where props or props and bars or chocks are used to support the roof at the working face, the roof under which any work of getting coal or filling tubs is carried on shall be systematically and adequately supported, and the props or chocks shall be set at such regular intervals and in such manner as may be specified in the notice hereinafter mentioned."

Sub-s. 2: "Holing props or sprags shall be set as soon as practicable, and shall be set at such regular intervals and in such manner as may be specified in the notice hereinafter mentioned, and shall not be removed until the coal is about to be taken down and before the roof supports (if any) have been advanced in the manner specified in the notice."

Sub-s. 3: "In all parts of a roadway in which sets or trains consisting of three or more tubs are coupled or uncoupled, the roof and sides shall be systematically and adequately supported, and in such parts and in all other parts of the roadway the roof or sides of which require to be supported, if props or bars are used as supports, such supports shall be set at such regular intervals and in such manner as may be specified in the notice hereinafter mentioned."

Sub-s. 4: "The manager shall, by notice, specify the manner in which the supports are to be set and advanced, and the maximum intervals to be observed on roadways between the supports, and at the face (*a*) between each row of props; (*b*) between adjacent props in the same row; (*c*) between the front row of props and the face; (*d*) between the holing props or sprags; (*e*) between chocks: Provided that the interval between holing props or sprags shall in no case exceed six feet."

The defenders in their answer admitted most of the allegations in the pursuer's condescendence, but explained that on the morning of the accident Edward M'Mullan and Thomson were about to begin working on a small block of coal of about

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Sub-s. 5: "If the inspector of the division considers that the system of supporting the roof and sides adopted in any part of a mine is unsatisfactory, either by reason of the distances fixed or any of them being excessive or otherwise, he may require the manager to fix some less distance or otherwise modify the system, and the manager shall comply with the requisition unless he disputes the reasonableness thereof, in which case the dispute shall be settled in manner provided by this Act for settling disputes."

Sect. 52, sub-s. 1: "In any part of a mine where any work is being carried out which necessitates the removal of roof supports, temporary supports shall, in all cases, be set so as to secure the safety of the persons employed."

Sub-s. 2: "Props shall not be withdrawn from the waste or goaf or from under a roof which appears to a fireman, examiner, or deputy to be insecure otherwise than by means of a safety contrivance, and it shall be the duty of the firemen, examiners, and deputies to examine all roofs from under which props are about to be withdrawn with a view to determining whether the props ought to be withdrawn by means of a safety contrivance."

Sect. 102, sub-s. 8: "The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

9 ft. by 12 ft., which was all that was left of the stoop on which they were engaged. They began this work in the usual and approved manner by removing the head coal from the roof of the room, taking down the original props which supported the roof, one or two at a time, and putting in other props and supports from time to time to uphold the roof when they had cut away the head coal. While they were putting in one of these props the accident happened.

Among the defenders' pleas in law were (1.) that the action was excluded by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925 (1), and was incompetent; (2.) that the pursuer's averments were irrelevant; and (5.) that the defenders were entitled to absolvitor by virtue of s. 102, sub-s. 8, of the Coal Mines Act, 1911, in regard that it was not reasonably practicable to avoid or prevent the alleged breach of statutory duty.

The Lord Ordinary (Lord Mackay) held that there were all the necessary elements for a claim by the pursuer to compensation under the Workmen's Compensation Act, 1925; that being so, no other remedy was open to him except the alternative remedy specified in s. 29 of that Act—namely, a claim for damages for injury caused by the personal negligence or wilful act of the defenders or of some person for whose act or default the defenders were responsible; that the only negligence alleged against them was a breach of statutory duty; that in the circumstances they were not guilty of any breach of statutory duty, and that, if they had been, the breaches alleged did not constitute personal negligence or wilful acts within the meaning of the Act. He therefore sustained the first and second pleas in law and pronounced an interlocutor dismissing the action.

The pursuer reclaimed to the Second Division of the Court of Session. That Court being of opinion that there was a prima facie case of personal negligence in the respondents within the meaning of s. 29 of the Workmen's Compensation Act, recalled the interlocutor of the Lord Ordinary, and pronounced an interlocutor repelling the first and second pleas in law of the defenders, and remitting the case to the

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(1) See headnote.

Lord Ordinary to order issue or issues for trial and to proceed therein.

The defenders appealed to this House.

May 16, 18. *T. M. Cooper K.C.* and *A. G. Erskine Hill* (both of the Scottish Bar) for the appellants. The matter in dispute in this appeal is the meaning of the words "personal negligence" in s. 29 of the Workmen's Compensation Act, 1925. When the history of the legislation affecting employers and workmen is considered it seems clear that the words "personal negligence" were not intended to include a mere non-performance of a statutory duty, whether by an employer himself or by a subordinate. They were intended to exclude the negligence of a servant, or superintendent, or independent contractor, and to include only negligence at common law in which the employer himself is concerned, or, if the employers are a company, then negligence at common law of the manager or other officer appointed to act for the company in the discharge of a common law duty which has been neglected. At common law the employer was not liable to a workman for injury due to the negligence of a foreman or superintendent or other fellow servant: *Wilson* v. *Merry*. (1) First by the Employers Liability Act, 1880, and then by the Workmen's Compensation Acts, the employer was stripped of the defence of common employment and was exposed to claims for compensation for injuries due to the negligences of others. These negligences might, and often did, include breaches of statutory duties, and these duties might be neglected by the employer himself or by a subordinate. Where a subordinate was the defaulter, there, but for the enactment now contained in s. 29 of the Workmen's Compensation Act, 1925, the workman might have taken his choice between two proceedings, one for compensation under the new legislation, and another at common law for breach of the statutory duty. The whole object of s. 1, sub-s. 2 (*b*), of the Act of 1897, then of s. 1, sub-s. 2 (*b*), of the Act of 1906, and now of s. 29 of the Act of 1925, was to protect the employer from claims for damages in respect of breaches of statutory duty by a subordinate, because the Legislature had already provided the workman with a sure and certain remedy under the Acts for injuries from those breaches. For negligence other than that which consists in the breach of a statutory duty by a subordinate the employer is still liable, whether the negligence is his own default or, in the case of a company, that of some officer whose act is the act of the company. But for negligence which consists merely in the breach of a statutory duty in which he himself is not concerned, the employer is exempted from liability by virtue of s. 29. Any other construction of that section fails to attribute any meaning to the word "personal" in the expression "personal negligence." *Rudd* v. *Elder Dempster & Co.* (1) was rightly decided and ought to be approved.

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(1) (1868) L. R. 1 H. L. Sc. 326.

[The following cases were cited: *Caswell* v. *Worth* (2); *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (3); *Groves* v. *Lord Wimborne* (4); *Bett* v. *Dalmeny Oil Co.* (5); *Britannic Merthyr Coal Co.* v. *David* (6); *Lees* v. *Dunkerley Brothers* (7); *Black* v. *Fife Coal Co.* (8); *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (9); *Higgins* v. *Harrison.* (10)]

*A. P. Duffes* (of the English Bar and K.C. of the Scottish Bar), *W. Ingram K.C.*, *F. C. Watt* and *J. J. Cunningham* (all of the Scottish Bar) were present on behalf of the respondent, but not called on.

The House took time for consideration.

July 10. LORD ATKIN. My Lords, this is an appeal from the Second Division of the Court of Session who, reversing the decision of the Lord Ordinary, held that the action was competent. The action is brought by the pursuer for damages, alleging that his son, a coal miner, while working in the employ of the defenders, was killed owing to the "fault and negligence" of the defenders in not making secure the roof of the place

(1) [1933] 1 K. B. 566.
(2) (1856) 5 E. & B. 849.
(3) (1873) L. R. 8 Ex. 283.
(4) [1898] 2 Q. B. 402.
(5) (1905) 7 F. 787.
(6) [1910] A. C. 74.
(7) [1911] A. C. 5.
(8) [1912] A. C. 149.
(9) [1912] A. C. 693.
(10) (1932) 25 B. W. C. C. 113.

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where the son was working. The objection made to the action is based on s. 29 of the Workmen's Compensation Act, 1925, which provides " When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer . . . but the employer . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." The question is whether taking the allegations in the condescendence pro veritate, the proceedings allege injury caused by personal negligence or wilful act as aforesaid.

It will be noticed that the provisions of the section are not directed to forms of action. They deal with substance : and whatever the form of action, if it is based upon the fact that injury was caused by personal negligence, etc., as aforesaid, it is not affected by the section.

Now the pleading expressly alleges fault and negligence of the employer. The fault and negligence complained of is failure to observe the provisions of the Coal Mines Act. For this purpose it is unnecessary to determine whether the breach alleged is of s. 49 or of s. 52. They both involve an obligation to support the roof ; and if it were necessary to show that they are designed to secure the safety of persons employed in the mine, it is only necessary to refer to the terms of the sections themselves and to the fact that they are contained in Part II. of the Act which is entitled " Provisions for Safety."

It is further beyond question that these provisions impose a special duty upon the employer towards those for whose safety they are designed ; so that unless s. 29 intervenes an action will lie against the employer by such a person if injured by a breach of such duty. *Britannic Merthyr Coal Co.* v. *David* (1) ; *Black* v. *Fife Coal Co.* (2) ; *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (3), to cite only three cases decided by your Lordships' House. And in an action founded on a breach of such a duty the doctrine of common employment has no application, for the

(1) [1910] A. C. 74.
(2) [1912] A. C. 149.
(3) [1912] A. C. 693.

duty is imposed upon the employer, and it is irrelevant whether his servants had disregarded his instructions or whether he knew or not of the breach.

Having reached these conclusions I find the result to be that the employer is alleged to have committed a breach of a duty owed by him to his servant to take a particular precaution (namely, support of the roof) for his servant's safety whereby the servant was injured. In my opinion that state of facts constitutes negligence of the employer; and I am unable to conceive of any accurate definition of negligence which could exclude it. All that is necessary to show is a duty to take care to avoid injuring; and if the particular care to be taken is prescribed by statute, and the duty to the injured person to take the care is likewise imposed by statute, and the breach is proved, all the essentials of negligence are present. I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the Legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy.

The next question that arises is whether the breach of duty alleged is personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. It was contended that the employer could not be liable unless he himself was guilty of the act or omission complained of, or had ordered it or in some other way was privy to it. My Lords, I cannot so read the section. The words "personal negligence" apply both to the employer and to the person for whom he is responsible. They appear to denote no more than negligence, the word "personal" having special reference to the employer, in order to make clear that in ordinary cases where the employer would only be vicariously liable for the negligence of his servants, but might be excused by the doctrine of common employment, he is to remain liable if it is he himself who was negligent and not merely his servants. Where the duty to take care is expressly imposed upon the employer and not discharged, then in my opinion the employer is guilty of negligence and of "personal" negligence.

But, my Lords, there is another view of the section which I do not find discussed in the judgments below, but which appears to make unnecessary even the imputation of negligence to the employer. If in violation of the statute the roof was not made secure, the failure to perform the statutory duty was negligence either of the employer or of his servants. No one can I think doubt that if the obligation to observe statutory precautions is imposed upon a servant, the servant's breach is negligence. The servant would be liable to his fellow servant for injuries caused by such breach: see *Lees* v. *Dunkerley Brothers*. (1) Indeed except upon this footing the discussion of the doctrine of common employment would appear to be irrelevant in such cases as *Groves* v. *Lord Wimborne*. (2) But the latter case expressly decides that, where the duty to observe the statute is imposed upon the employer, the employer is responsible for a breach committed by his servants. It can therefore be affirmed that in such a case as the present the injury was caused by the negligence of some person for whom the employer is responsible, which is all that is necessary to defeat the operation of the latter part of s. 29, sub-s. 1. Subject therefore to appropriate pleading there is no difficulty in establishing the employer's liability in such a case.

I am conscious that the result at which I have arrived is not in accord with the decision of the Court of Appeal in *Rudd* v. *Elder Dempster & Co.* (3), a judgment given a few days before the decision of the Court of Session, but at that time not reported. But after weighing the judgments in both cases I prefer the reasoning in the present case. I venture to think that the judgments in the Court of Appeal have attached too much importance to forms of action. No doubt an action upon a statute may have nothing to do with negligence: the first case cited in Comyn's Digest is an action for false imprisonment based it is said on a breach of Magna Charta. All that has to be shown is a breach of the statutory duty causing injury. But it does not follow that the duty imposed may not be a duty the breach of which does in fact constitute negligence. If so the injury is caused by that negligence and the section therefore applies. I am not pressed by the challenge to point out from what " proceedings independently of this Act " the employer is intended to be relieved by the latter words of the section. It may be that the section merely meant to make clear that the Act did not intend to abolish the doctrine of common employment. It may be that there are obscure obligations in Acts public or private regulating the rights and duties of employers to their servants. But whether the words now find any content or not the meaning of the first part of the section appears clear. I venture to think that the most improbable of all constructions is that Parliament in 1880 deliberately meant to take away the right of a workman to sue for breach of express statutory provisions enacted for his safety, a right which had been enforced in the Courts in numerous actions years before that date. It is remarkable that the section has been in one or other Workmen's Compensation Act since the first in 1897. Not only has the point never been raised until two years ago but numerous decisions have been given including at least three in the House of Lords which would not have been given if the point were a good one. The section was re-enacted in 1925 when these House of Lords decisions based on the Coal Mines Acts held the field. Even if there were a doubt as to their correctness I should have found great difficulty in the circumstances in coming to a conclusion that they were based on a misapprehension. It is true that the point was not discussed ; but in an Act which has been so closely scrutinized by employers, insurance companies and counsel, and not least by county court judges all over the kingdom, I think it far more probable that the words of the section have been known to the parties and to the Court, and the present contention thought untenable than that they have inadvertently escaped attention. It may of course be that by some mysterious dispensation the truth has been hid from the tribunals of a past generation and revealed to the present ; but I cannot persuade myself that this is the case.

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(1) [1911] A. C. 5.

(2) [1898] 2 Q. B. 402.

(3) [1933] 1 K. B. 566.

On the question of relevancy I am satisfied for the reasons which commend themselves to my noble and learned friends Lord Thankerton and Lord Macmillan that the decision under appeal cannot be disturbed on this ground. I am of opinion that this appeal should be dismissed with costs.

Lord Warrington of Clyffe (read by Lord Macmillan). My Lords, this is an appeal from an interlocutor dated December 29, 1932, whereby the Second Division of the Court of Session (the Lord Justice-Clerk and Lords Hunter, Anderson and Murray) unanimously recalled an interlocutor dated November 10, 1932, of the Lord Ordinary (Lord Mackay) dismissing the pursuer's action, and remitted the action to the Lord Ordinary to order issues and proceed in the cause.

Two questions arise for decision (1.) competency, or, as we should express it in terms of English law and practice, whether the pursuer's allegations if proved disclose a valid cause of action against the defenders, and (2.) relevancy—namely, whether the pursuer's pleadings sufficiently allege the cause of action relied upon. The issue of competency involves the question whether the action is one which is open to the pursuer under s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925.

I will first deal with the question of competency. Speaking generally, but with sufficient accuracy for the present purpose, the pursuer's case is that his son Edward M'Mullan, a miner in the employment of the defenders, was set to work removing coal at a place of danger inasmuch as the roof adjacent to his place of work was unsupported and fell bringing down part of the roof nearby, which in its fall killed the pursuer's son, whereby he the pursuer suffered damage, and that the accident was the result of a breach by the defenders of the statutory obligations imposed upon them by the Coal Mines Act, 1911, s. 49, which breach gave to the pursuer a right of action against the defenders, and that such action was admissible under the Workmen's Compensation Act, 1925, s. 29, notwithstanding that the pursuer would, if he had chosen, have had a right to compensation under that Act.

The most important question is the nature of the right of action if any resulting from a breach by the employer of a statutory duty imposed upon him by the Legislature.

Sect. 49 of the Coal Mines Act, 1911, is in the following terms :—" The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

This involves, it will be noted, an absolute obligation on the owner to make secure the roof and sides referred to, and a further obligation that no person shall work in a travelling road or working place which is not so made secure.

As to the law on the subject of the liability of owners for breach of obligations imposed by statute for the protection of those employed by them, I think the following propositions are supported by authority :—

(1.) If the obligation is to do or abstain from doing a particular thing and on the construction of the statute the obligation is created for the protection of a particular class, e.g., workers in a mine or factory, then a member of that class injured by the non-performance of the obligation is entitled to sue the owner in an ordinary action founded on personal negligence.

(2.) The fact that the obligation has not been performed is in itself evidence of personal negligence on the part of the owner.

(3.) That the owner cannot relieve himself of his obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part, nor was it open to him at common law to plead common employment.

(4.) There appears to be no material difference in this respect between the law of England and that of Scotland.

In the present case I have no doubt that the obligation in question was imposed for the protection of the particular class. Neither have I any doubt that it is imposed as a personal obligation on the owner not capable of delegation. It is true that, in the case of an abstraction such as a company, though the obligation may be imposed upon the legal entity so designated, it can only be performed or neglected by some person or persons acting on its behalf, still the neglect may properly be regarded as the personal neglect of the company itself. I agree with Lord Murray (1) that "negligence consists of nothing more than a breach of the positive duty to take care imposed by law."

If therefore s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, had not been passed I should have been of opinion that the present action is plainly competent. I now come to the consideration of that section. It is in the following terms:

"29.—(1.) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The appellants rely on the exception contained in the last few words.

It follows I think from what I have said that the failure to render secure the roof adjacent to the place where the pursuer's son was working was "personal negligence of the employer" within the meaning of the Act. After all, personal negligence means nothing more than neglect on the part of the person concerned to perform the duty imposed upon him for the protection of the pursuer amongst others. The person concerned is here the Company, but as I have said the Company as a legal entity is capable of performing or neglecting a duty, although the action or the neglect concerned must be that of some physical person acting for it.

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(1) 1933 S. C. 235, 251.

In my opinion therefore the defenders' plea of incompetency fails, and the pursuer's pleadings (subject to the question as to relevancy) disclose a prima facie cause of action on the part of the pursuer.

As to relevancy I need say no more than that in my opinion the pursuer's allegations are sufficient to raise a case under s. 49, and if so this plea on the part of the defenders also fails.

I should add, however, that it was contended by the appellants' counsel that it was not clear on the pleadings whether the pursuer alleged a breach of s. 52 of the same Act. As to this it seems to me that on the true construction of s. 52 it does not create a new obligation but merely emphasizes that created by s. 49 "to secure the safety of the persons employed" even if the original supports had been removed under circumstances of necessity mentioned in the section.

As to the authorities cited on either side these were so thoroughly discussed in the judgments of the learned Lords in the Second Division that I find it superfluous to deal with them except to say that I can find in them nothing inconsistent with the view I have expressed above as to the law on the subject in question.

There are, however, two cases as to which it is necessary to say a few words. These are *Rudd* v. *Elder Dempster & Co.* (1) and *Higgins* v. *Harrison*. (2)

As to *Rudd's* case (1) I have had the advantage of reading the opinion of my noble and learned friend Lord Wright, and I agree with him in his dissent from the judgments of the learned judges in the Court of Appeal so far as they deal with the question of the construction of s. 29.

I also dissent from the views expressed by Slesser L.J. in *Higgins* v. *Harrison* (2), which, as they go beyond what was necessary for the decision in that case, are obiter dicta.

On the whole I am of opinion that the appeal should be dismissed and the interlocutor of the Second Division should be affirmed with costs in this House.

LORD THANKERTON. My Lords, I agree that the action is not rendered incompetent by the provisions of s. 29 of the

(1) [1933] 1 K. B. 566. (2) 25 B. W. C. C. 113.

Workmen's Compensation Act, 1925, and for the reasons stated by my noble and learned friend on the Woolsack.

The pursuer confines his case of fault to a breach of the statutory duty imposed on the defenders by s. 49 of the Coal Mines Act, 1911. The latter maintain that the pursuer's averments do not disclose a relevant case under s. 49, as they set out that he was engaged in work which necessitated the removal of roof supports, which they maintain does not fall under s. 49 but under s. 52. In my opinion the latter section in no way supersedes s. 49, but is ancillary to it.

The defenders further contend that the pursuer has not relevantly averred that he was in a "working place"; but, in the absence of any definition of the term in the statute, I see no reason against giving it the ordinary sense of a place where a miner is set to work by his employers, as is averred by the present pursuer. The defenders also commented on the pursuer's failure to condescend on the name of the person who in fact omitted to secure the roof, but the pursuer complains of a breach of personal statutory duty by the defenders and that is sufficient. While the pursuer's averments are not a model of lucidity, I agree with the learned judges of the Second Division that he has stated a relevant case.

As regards the mode of trial, I see no adequate reason for withholding this case from trial by a jury. I would only add that I agree with the view of the majority of the learned judges of the Second Division that it was their province, on recall of the Lord Ordinary's dismissal of the action, to settle the mode of trial.

Accordingly I agree that the appeal should be dismissed with costs.

LORD MACMILLAN. My Lords, The pursuer in this action claims damages from the defenders in respect of the death of his son who was killed while at work in the defenders' employment in a coal mine at Cowdenbeath. He avers that the death of his son "was due to the fault and negligence of the defenders," and his first plea in law is that "having suffered loss, injury and damage through the fault of the defenders as condescended on " he " is entitled to reparation therefor." The particular fault on the part of the defenders which the pursuer alleges is that they failed to perform the duty imposed on them by s. 49 of the Coal Mines Act, 1911. Other failures in duty are mentioned but it was agreed at your Lordships' bar that the pursuer's case rested on the alleged breach of s. 49. That section requires in absolute terms that " the roof and sides of every travelling road and working place shall be made secure." The pursuer avers that the roof of the place where his son was set to work was in point of fact not made secure and that in consequence it fell on his son and killed him.

All this seems straightforward enough. The action is a common form action of damages for negligence, and the negligence alleged is failure on the part of the defenders to perform a duty imposed on them by statute in the interests of the safety of their workmen, of whom the deceased was one.

But the defenders plead that the action is excluded by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, and your Lordships have had a full argument on this question, which is clearly one of much importance. The section has already been quoted. The material provision of the section, if I may expand it, enacts that an employer shall not be liable to any proceedings independently of the Workmen's Compensation Act in respect of injury to a workman arising out of and in the course of his employment except in case of personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible. It was not disputed that the fatal injury which the deceased sustained arose out of and in the course of his employment. That being so, the defenders submitted that they were not liable to the present proceedings because the pursuer had not alleged personal negligence on their part or on the part of some person for whose default they were responsible.

The question thus comes to be whether the defenders are right in so characterizing the pursuer's allegations. Their argument is that all that has been alleged is a breach of a statutory obligation and that such an allegation is not an

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allegation of negligence or at any rate not of personal negligence.

This argument is in my opinion untenable. It is plain in the first place that s. 49 imposes an obligation on the defenders personally for breach of which they are liable, unless they can bring themselves within the protection of s. 102, sub-s. 8. If the defenders do not comply with s. 49 they are rendered by s. 75 personally guilty of an offence against the Act unless they establish the defence which the statute leaves open to them.

In the next place the duty to comply with s. 49 is equally plainly imposed on the defenders in the interests of their workmen. The section occurs in Part II. of the Act, the heading of which is " Provisions as to Safety," and the purpose of s. 49 is to ensure the safety of the workmen employed in the mine.

Here then are the essential elements of a case of negligence. Where two persons stand in such a relation to each other that the law imposes on one of these persons a duty to take precautions for the safety of the other person, then, if the person on whom that duty is imposed fails to take the proper precautions and the other person is in consequence injured, a clear case of negligence arises. That is exactly the case here alleged. Such negligence is in my opinion " personal negligence " within the meaning of the Workmen's Compensation Act. It appears to me quite immaterial whether the duty to take care arises at common law or is imposed by statute. It is equally imperative in either case and in either case it is a duty imposed by law. I am afraid I fail to understand the argument that an employer who is enjoined by statute to take particular precautions for the safety of his employees is not guilty of negligence if one of his employees is injured through the employer's failure to take the precautions prescribed, merely because the duty to take those precautions has been imposed by statute and does not or may not arise at common law. Such a doctrine is in my opinion no part of the law of Scotland. I accordingly agree with the learned judges of the Second Division of the Court of Session in holding that the defenders' plea founded on s. 29, sub-s. 1, of the Workmen's Compensation

Act is not maintainable. So far as the English cases cited to your Lordships may countenance a contrary view it would perhaps be enough to say that in my opinion they do not express the law of Scotland, but it is right that I should add that I find myself entirely in agreement with your Lordships' criticism of them.

The defenders further submitted that even if the action were not incompetent, their second plea, which was directed to the relevancy of the action, should be sustained. The argument was that the pursuer's case was really self-contradictory, inasmuch as his averments showed that he was engaged on a job which necessitated the removal of roof supports and therefore precluded the application of s. 49 which requires the roof to be made secure, and that he had failed to make the necessary averments to set up a case of negligence under s. 52 which prescribes the precautions to be taken when roof supports are being removed. It was also submitted that his averments showed that he was not in a "working place" within the meaning of s. 49. Further, the defenders argued that there should be specification of the particular person who had on the occasion in question failed to take the proper precautions. The pursuer's averments are not a model of lucidity but I think that they survive the attack made on them. The expression "working place" has no statutory definition, but I think it ought to be understood as referring to any place where a miner is set to work, and in my opinion s. 52 is a special case within the generality of s. 49 rather than an entirely independent provision. I see no reason to require that the pursuer should specify who it was who in fact omitted to take the prescribed precautions. The pursuer is complaining of the defenders' breach of the duty laid on them personally. I agree therefore that the plea to the relevancy was rightly repelled.

As regards further procedure the learned Lord Justice-Clerk preferred that the case should go back to the Lord Ordinary in order that he might exercise his discretion as to whether the inquiry should be by proof or by jury trial, but his colleagues were of opinion that the case was one for jury trial and that is the decision embodied in the interlocutor under appeal. In my view the Second Division quite rightly exercised the discretion which the Lord Ordinary, in view of his dismissal of the case, had not had occasion to exercise and I see no ground for differing from their decision. I concur in the motion that the appeal be dismissed with costs.

Lord Wright. My Lords, the first question in this appeal is that raised by the first plea in law of the appellants (defenders) which is that " the action being excluded by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, is incompetent and should be dismissed." That plea found favour with the Lord Ordinary but was repelled by the Second Division of the Court of Session, from which decision this appeal is brought.

The respondent (pursuer) is the father of a miner who, while working in the employment of the appellants (a limited company), was killed by a fall of the roof in their colliery, and he brought his action for damages for the loss, injury and damage sustained through the death of his son. He alleged as ground of complaint that the death was caused by a breach of the appellants' statutory duty under certain sections of the Coal Mines Act, 1911. It is enough for purposes of this opinion to refer to s. 49, on which reliance was particularly though not exclusively placed, and which is in these terms: " The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure." It is objected by the appellants that such a claim is excluded by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, which is in full before your Lordships, but the essential words of which are these: " When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer . . . . but the employer . . . . shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." It follows that this section must be fatal to the claim unless the claim competently alleges "the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible," and hence it must be determined whether the breach of statutory obligation alleged comes within these words. This same section of the Workmen's Compensation Act has appeared in identical terms in the first Act of 1897, and in the amending Act of 1906; and in very many cases, some reported, many others not reported, claims such as the present have succeeded without this defence being raised; in some, to be later referred to, such claims have been upheld by this House. The question however is now raised.

It happened that, a few days before the Court of Session gave judgment in the present case, the same point was the subject of the judgment of the Court of Appeal in *Rudd* v. *Elder Dempster & Co.* (1) That action, so far as relevant for present purposes, was based on breach of a statutory regulation, and the Court of Appeal held on the construction of the relevant section of the Workmen's Compensation Act that the claim was excluded. Your Lordships are therefore faced by two conflicting decisions on the matter in question and have to discharge the difficult and delicate duty of deciding between them. The crucial question is what is the meaning of the words as used in the section "the personal negligence or wilful act of the employer and of some person for whose act or default the employer is responsible." It might seem at first that the word "personal" is otiose, since to bring home liability for negligence the negligence must be "personal." The word may, however, have been used to exclude mere vicarious negligence and to preserve the peculiar but well established rule described as the doctrine of common employment. Thus an employer may be "personally" negligent in respect of the acts and omissions of himself; but he may also, I think, be described as personally negligent in respect of breach of a duty imposed on him by law and of such a character that he is debarred from avoiding responsibility by delegating

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(1) [1933] 1 K. B. 566.

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its performance, or by invoking the doctrine of common employment. Hence in my opinion it is impossible to construe these words without a careful understanding of the nature and effect of a breach of a statutory obligation, such as that embodied in s. 49 of the Coal Mines Act, 1911.

This obligation belongs to the familiar type of statutory requirements or prohibitions, imposed on employers subject to a penalty for the breach, and imposed for the protection of the workmen because they involve precautions for their safety. There is no provision in this as in similar cases for a civil remedy in favour of the injured workman or his dependants, the only sanction expressed being that of fine or other penalty, but it has long been held that though such a statute creates a public wrong, the common law gives a cause of action for damages for the private injury flowing from the breach of the statute. Whether this is so or not in case of any particular statute must (to quote the words of Lord Cairns C. in *Atkinson* v. *Newcastle Waterworks Co.* (1)) "depend on the purview of the Legislature in the particular statute, and the language which they have there employed." But it is not here in controversy that in such a case as this the common law gives a private cause of action in proper cases for breach of the statute: that this is so has been recognized in a number of authorities, some in this House, to some of which reference will be made hereafter. The provisions of s. 49 of the Coal Mines Act clearly belong to the class which impose a duty on the employer to take certain precautions for the protection of his workmen; it is absolute in its terms, save as modified by the later s. 102, sub-s. 8, which is as follows: "The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach." This provision is not directly material in a proceeding such as this where the issue is as to the competency of the pursuer's allegations, since it deals with matter of defence, the onus of establishing which is on the employer, but apart from that defence and, it may be, apart from defences in some cases based on a plea of contributory negligence or a plea of taking the risk, the cause of action is complete on proof of breach of the statutory duty, and in any case it is a duty which attaches to the employer personally, whether corporation or individual, since the employer cannot delegate the duty and cannot escape liability by relying on the doctrine of common employment. In such a case as the present the liability is something which goes beyond and is on a different plane from the liability for breach of a duty under the ordinary law, apart from the statute, because not only is the duty one which cannot be delegated but, whereas at the ordinary law the standard of duty must be fixed by the verdict of a jury, the statutory duty is conclusively fixed by the statute. But the duty is the same in kind in this respect, that it is a duty to take precautions and care for the safety of the workmen; it is a duty to take care which is owed to the workman, and which if broken constitutes negligent conduct, for which, if damage ensues to the workman affected, damages are recoverable. Hence the breach of such a duty as that in question has been, I think, correctly described as statutory negligence. In my judgment, therefore, such a claim as that in question can fairly and properly be described as based upon a case of negligence, and of personal negligence, since it attaches to the employer personally. That I take to be the view of the Court of Session, and I agree with them in the conclusion that the claim is a claim based on personal negligence of the employer within the meaning of s. 29, sub-s. 1, of the Act.

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(1) (1877) 2 Ex. D. 441, 448.

On the other hand the Court of Appeal found on what they regard as the natural meaning of the words of s. 29, sub-s. 1, —though I find it hard to see how, in the case of so technical and complex a subject as the law of negligence, the view of the natural man can have any significance. They then distinguish the statutory liability as something different in essence from negligence, and they limit the meaning of the word " personal " to something which is actually done or omitted by the employer himself, applying the doctrine of common employment to exclude any responsibility for the acts of his servants or agents.

No doubt such expressions as personal negligence or misconduct are in certain collocations used in that latter sense, but the meaning of the words in the section must, I think, be ascertained by having regard to the context in the sense I have stated. In the same way in certain cases negligence or common law negligence has been contrasted as being different from statutory liability, though in each case the claim is a claim at common law. But again I think that contrast has been drawn secundum subjectam materiam and in order to point such differences as the rule that the doctrine of common employment does not apply, and the fact that in other than statutory negligence it is necessary to establish to the satisfaction of the jury the standard of care which has not been fulfilled, whereas in statutory negligence the standard is given by the statute itself. The Court of Appeal would limit what is saved by s. 29, sub-s. 1, to actions under the Employers Liability Act, 1880, which in specially restricted cases abolished the defence of common employment. But as will appear when I summarize the course of the authorities, a right of action by a workman or his dependants for breach by his employer of a statutory duty was a well known and most important right. To deprive the workman of such a right would, I think, only be competently effected by clear words. On any view in my judgment the words of s. 29, sub-s. 1, are not sufficiently clear and unambiguous to effect so radical a change. A fairer interpretation is that they leave unaffected the workman's existing civil remedies, except in so far as he avails himself of the alternative rights given. A statute must not be construed as changing the common law, unless a clear intention to do this is shown, and then only to the extent to which the intention to change is clearly shown.

It may be objected that the meaning I have given to the words " personal negligence or wilful act of the employer " is inconsistent with the following words " or of some person for whose act or default the employer is responsible." I do not accept this view. No doubt the words " some person for whose act or default the employer is responsible " were inserted to deal specifically with cases coming within the Employers

Liability Act, 1880, which was passed to limit according to its provisions the application of the doctrine of common employment though they are also apt to cover the cases, not uncommon in practice, in which the breach of duty complained of is due to the fault of some employee for which the employer is liable, since the employer, in the event of a breach of statutory duty, cannot defend himself by recourse to the doctrine of common employment. But in my opinion the breach of the statutory duty does per se constitute the " personal negligence of the employer," quite independently of the following words on which in such a case the workman has accordingly no need to rely. In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing: on all this the liability depends, and if this liability is attached by law formally to the employer, as happens in the case of a breach of the statutory duty, the whole position is I apprehend correctly described as " personal negligence of the employer."

I think the position becomes clearer by an examination of the most important of the relevant authorities. Liability for damages for a breach of a statutory duty to take precautions and care for the protection of the individuals concerned was well recognized before the Workmen's Compensation Act, 1897. It is not inconvenient to begin by referring to the authoritative work of Bullen and Leake on Precedents of Pleading: I refer to the third edition published in 1868, the latest analysis before the Judicature Acts of forms of action. At p. 375 I find under the general head of negligence a count " for negligence in not fencing machinery " under the Factory Act, 7 & 8 Vict. c. 15, s. 21, citing among other cases *Caswell* v. *Worth* (1), where an action for failure to fence as under the Factory Act failed on the ground that the plaintiff's injury was caused by want of ordinary care of the plaintiff himself: Coleridge J. said (2), " The statute makes the omission of a certain act illegal, and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omission has the right of suing at common law." I shall pass over other cases till I come to *Britton* v. *Great Western Cotton Co.* (1), where again failure to fence was held to constitute a default on the part of the employer. In *Blamires* v. *Lancashire & Yorkshire Ry. Co.* (2), the action was by a passenger by railway for damages for injury alleged to be due to the absence of a communication cord required to be provided under penalties in such a train as that in question by the statute 31 & 32 Vict. c. 119, s. 22: the plaintiff succeeded on the ground that the Legislature had directed a precaution to be taken for the protection of passengers; the defendants' failure to take that precaution was treated as evidence of negligence, though apart from that failure there was no sufficient evidence of negligence. In 1898, after the Workmen's Compensation Act, 1897, was enacted but just before it came into force, in the case of *Groves* v. *Lord Wimborne* (3), the Court of Appeal decided that the action, which was for breach of a statutory duty to fence machinery under the Factory and Workshop Act, 1878, lay and that the defence of common employment did not avail. A. L. Smith L.J. said (4): "In my judgment the defence of common employment only applies where the action is by a servant against the master and is founded upon the negligence or misconduct of his fellow-servant. In such a case the doctrine of common employment attaches. In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant or of any one else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person." The above and similar passages in the other judgments in that case have been relied on as showing that

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(1) 5 E. & B. 849.

(2) Ibid. 855.

(1) (1872) L. R. 7 Ex. 130.
(2) L. R. 8 Ex. 283.
(3) [1898] 2 Q. B. 402.
(4) Ibid. 410.

breach of statutory duty cannot be described as negligence: but I think it is clear that the Lords Justices were having regard to the fact that Lord Wimborne took no part in the management of the factory and hence could in one sense not be guilty of negligence, and they treat the negligence of an employee or stranger as not material to be alleged. The language must, I think, be construed with that fact in mind, and not as saying that the breach of the statute cannot properly from another point of view be described as negligence attaching by law to the defendant personally. What is being emphasized is that there is no need to prove negligence as an issue for the jury, because the statute itself is conclusive evidence of negligence, unless it contains in itself some qualification. But the Lords Justices are also pointing out that the duty cannot be delegated or the responsibility shifted to someone else. This is the view which I think emerges from the later cases. Vaughan Williams L.J. adds some reservations as to contributory negligence or taking the risk. What he there says may need to be considered in some other case, but the mere contemplation of contributory negligence as a defence to the workman's claim seems to involve that the claim itself sounds in negligence. A few years earlier, and before the Workmen's Compensation Act, 1927, in the Scotch case of *Kelly* v. *Glebe Sugar Refining Co.* (1), Lord Adam had said "the neglect of the statutory provisions creates a prima facie case of fault against the factory owners which will render them liable in damages to their employees." In 1895, in Ontario in *Thompson* v. *Wright* (2), Boyd C. described a failure to guard dangerous machinery as "per se evidence of negligence." I prefer the latter description (per se evidence of negligence) to the former (prima facie case of fault), but in either case the judges were in effect describing the breach of the statute as negligence.

The subsequent cases appear to me to confirm this way of envisaging the question. I shall briefly refer to some. In 1905, in *Bett* v. *Dalmeny Oil Co.* (3), a claim was brought and succeeded for breach of a statutory duty of support very similar to that in question in this appeal. It was contended that apart from the Workmen's Compensation Act the pursuers could not recover at common law but that the sole remedy lay under the Employers Liability Act, the accident having been caused through the fault of the manager or overman as fellow employees. Lord McLaren delivering the judgment of the First Division consisting of himself, Lord Adam and Lord Kinnear used these words: "It follows, then, that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organization of labour of which he is a member, and that the master is only responsible for the performance of such duties as he can reasonably be supposed to undertake in person—such as the provision of a competent staff of men, adequate material, a proper system and effective supervision. But in the case under consideration the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager, and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mine owner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager." This passage was quoted with approval by Lord Shaw in *Black* v. *Fife Coal Co.* (1): Lord Kinnear also gave judgment in the latter case in this House, and there is nothing to show that he had changed his mind, but rather the contrary. I think that Lord McLaren has well expressed the true principle and in a form which agrees with the language of the section of the Workmen's Compensation Act which was re-enacted in 1906. A neglect of duty which cannot in law be

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(1) (1893) 20 R. 833, 835.

(2) (1892) 22 Ont. Rep. 127, 130.

(3) 7 F. 787.

(1) [1912] A. C. 149, 173.

delegated seems to me to be distinguishable from "personal negligence" only by quibbling with language.

The next case I shall refer to is *David* v. *Britannic Merthyr Coal Co.* (1), affirmed in this House in *Britannic Merthyr Coal Co., Ld.* v. *David.* (2) In the Court of Appeal Fletcher Moulton L.J. thus summed up the position (3): "By embodying in the provisions of an Act, such as the one now under consideration, those precautions which it is advised should be observed in the management of these dangerous undertakings the Legislature erects a standard of carefulness and requires all who carry them on to come up to that standard. It no longer is left to the chance opinion of a jury to decide whether these precautions may properly be omitted. The Legislature decides the question for them, and accordingly non-compliance with the provisions of the statute carries with it the same civil consequences that a verdict of negligence would do. There is, however, one respect in which my interpretation of the Act increases the burden of the employer. It makes him liable for the consequence of this statutory negligence (if I may use such a phrase) even towards his own servants, whereas the doctrine of common employment would save him from this liability in a case of common law negligence." The claim was for damages for breach of the Coal Mines regulations. This House in affirming the order of the Court of Appeal for a new trial, held that the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners rested on them and not on the plaintiff. Their Lordships made some general reservation as to what was said in the Court of Appeal, but I do not find that the passage I have quoted from Fletcher Moulton L.J. is out of accord with the other authorities and it seems to me, as it did to Lord Shaw in *Black* v. *Fife Coal Co.* (4), to be in line with them in defining a liability for what may well be called "personal negligence" of the employer.

In 1911 the Act in respect of which these proceedings are brought was passed. It is a consolidating and amending Act: in view of the reported cases I have cited, the Legislature

(1) [1909] 2 K. B. 146.
(2) [1910] A. C. 74.
(3) [1909] 2 K. B. 164.
(4) [1912] A. C. 149.

in referring, as it did in s. 102, sub-s. 8, quoted above, to "an action for damages or for breach of a statutory duty" must I think have had in mind actions by a workman or his dependants and cannot have contemplated that they were excluded by the Workmen's Compensation Act. The nature of such an action was again considered in *Black* v. *Fife Coal Co.* (1) It was again held that the doctrine of common employment did not apply to a claim for breach of a statutory duty: Lord Kinnear said (2): that doctrine "goes no farther than to relieve the master of liability to his servant unless there be negligence on his part in that which he personally undertakes, or is required by statute to do, for the benefit of the servant." Thus he answers the question whether the statute "imposes upon the mine owner personally" the duty on which the suit is based. Lord Shaw expressed his opinion (3): "that the defence of common employment is not applicable where a statutory duty imperatively laid has been neglected." The workman's claim was upheld, as also was the case in the later decision of *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (4), where on the terms of the regulation it was held that an absolute obligation rested on the mine owners to provide adequate raising and lowering apparatus: the widow of a workman killed by the breach of this obligation accordingly recovered; the obligation was held to be absolute so that no question of common employment or negligence was relevant: it is true that the breach was described as one to which it was no answer that the Colliery Company were not personally negligent. But these words so used alio intuitu do not in my opinion afford guidance on the construction of s. 29, sub-s. 1, of the Workmen's Compensation Act, 1897, which after all these cases and others not reported was again re-enacted in the same words in 1925.

I have so far discussed the question on the basis of the substantial meaning of the words as applied to the relevant circumstances and have on that basis stated my conclusion that in cases of a statutory regulation requiring care and precaution, positive or negative, to be taken for the safety of the workmen, the breach of that statutory duty is within the meaning of "negligence" as used in the section and is also "personal" because it cannot be delegated. That this is the true effect of these words "personal negligence" follows, I think, from the reasoning of all the authorities I have mentioned, even though at times such words as "personal negligence" or "personal misconduct" are used in contradistinction to negligence of servants and though "negligence" is at times used as being different from absolute statutory obligation or duty. But the substance must be looked at, and it cannot be ignored that, though this point might have been raised in all the cases I have cited and also in others, it was raised for the first time a year or two ago, first as matter of certain dicta in the Court of Appeal in *Higgins* v. *Harrison* (1) and then as a decision in *Rudd's* case. (2) I should not contest that in general the fact that under a statute decisions have been given on the true effect of the statute, without a point being taken by counsel or judges, does not necessarily constitute the matter a chose jugée so that in later cases the point cannot be taken. The circumstances of the case may have to be considered. But in the present case, the Legislature has twice re-enacted the words after the decisions I have cited and others given in the appellate Courts including this House. It is not merely that this course has gone on for about 35 years, but, having regard to the nature of the question, it is impossible to think that the very eminent judges were blind to the possibility of such a point under the relevant section of the Workmen's Compensation Acts; it seems a truer inference that the point was disregarded because not regarded as good. Indeed, the reasoning of the judges which I have quoted, e.g. that of Lord McLaren in *Bett's* case (3) seems inferentially to answer in advance the appellants' arguments. If I had arrived at a different conclusion as to the meaning of the words in question, I do not see how I could in the special circumstances have set up my own opinion against what I cannot but regard as a tacit

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(1) [1912] A. C. 149.
(2) Ibid. 162.
(3) [1912] A. C. 175.
(4) [1912] A. C. 693.

(1) 25 B. W. C. C. 113.

(2) [1933] 1 K. B. 566.

(3) 7 F. 787.

adjudication by the highest authorities. I have also pointed to what I regard as the significant language of s. 102, sub-s. 8, of the Coal Mines Act, 1911, and the re-enactment in two Acts of the identical words when the course of decisions was well established and notorious. Both the decisions of the Courts and the action of the Legislature seem consistent only with the meaning which I have attached as being in my judgment the true meaning of the words of the section.

I cannot derive any assistance from s. 32 of the Workmen's Compensation Act, 1925 (reproducing a similar section in the earlier Acts). It seems to me to be too remote from s. 29, sub-s. 1, which deals with civil liability whereas s. 32 deals with fines or criminal proceedings and the application of these fines. It may be that in a Workmen's Compensation Act it was thought worthy of special record that the discretion of the authorities as to the application of fines in some cases for the benefit of the injured man (though it does not affect any civil action) was preserved. But I need not pursue this further.

On the question of competency I am in agreement with the judgments of the Second Division of the Court of Session and think that the appeal from these judgments on this point should be dismissed. It follows that I dissent from the judgments of the Court of Appeal in *Rudd's* case (1) so far as they deal with this question of construction.

On the further question raised in this appeal, namely that as to relevancy and also as to the mode of trial, I am in complete agreement with the opinions of my noble and learned friends Lord Thankerton and Lord Macmillan. The appeal ought accordingly in my judgment to fail on all points.

*Interlocutor appealed from affirmed and appeal dismissed with costs.*

*Lords' Journals*, July 10, 1933.

Agents for appellants: *Beveridge & Co., for Wallace, Begg & Co., W.S., Edinburgh, and J. M. Davidson, Solicitor, Glasgow.*

Agents for respondent: *H. S. L. Polak & Co., for W. Steele Maitland, S.S.C., Edinburgh, and W. Philp, Solicitor, Kirkcaldy.*

(1) [1933] 1 K. B. 566.

[HOUSE OF LORDS.]

ST. JAMES' AND PALL MALL ELECTRIC LIGHT COMPANY, LIMITED . . . APPELLANTS;

H. L. (E.)*
1933
Nov. 9.

AND

THE ASSESSMENT COMMITTEE FOR THE CITY OF WESTMINSTER AND THE SURVEYOR OF TAXES FOR THE DISTRICT COMPRISING THE PARISH OF THE SAID CITY RESPONDENTS.

*Rates and Rating—Electricity Supply Undertaking—Sinking Fund provided from Revenue—Valuation of Hereditaments—Profits Basis—Inclusion of Contributions to Sinking Fund—Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 4.

By an agreement having statutory force by virtue of the London Electricity (No. 2) Act, 1925, an electricity supply company undertook and were obliged to transfer their undertaking to a proposed Joint Electricity Authority at a future date free of charge to the Authority. To provide the purchase money and consideration for the transfer the agreement empowered the Company to establish out of revenue two sinking funds, A to provide a sum equal to the value of the land, plant, machinery and other assets of the Company in use at the date of the establishment of the Joint Electricity Authority, and B to provide a sum equal in value to property acquired by the Company after that date. The charges which the Company were authorized to make for the supply of electricity were regulated by the agreement so as to cover various specified outgoings of the Company, and among them the payments to be made to and interest on the sinking funds. On the transfer of the undertaking the sinking funds were to be retained by the Company.

In rating the Company's undertaking under the Valuation (Metropolis) Act, 1869, upon the profits basis:—

*Held*, that the rating authority had rightly included in the gross receipts of the Company the amounts properly allocated to the service of the sinking funds.

Order of the Court of Appeal [1933] 1 K. B. 605 affirmed.

APPEAL from an order of the Court of Appeal (1) reversing an order of the King's Bench Division upon a special case stated under s. 40 of the Valuation (Metropolis) Act, 1869, after notice of appeal to the General Quarter Sessions for the County of London had been given against a decision of the Assessment Committee in respect of certain hereditaments of which the St. James' and Pall Mall Electric Light Co. (hereinafter called the St. James' Co.) were and are the occupiers. The hereditaments were described in the Valuation List for the parish of the City of Westminster, made and deposited on July 21, 1930, as electricity supply stations, offices and premises including 3 and 5 Burlington Gardens, 10 to 20 Carnaby Street, 1, 3 and 5 Ganton Street, 55 and 57 Great Marlborough Street, 1 to 14 Marlborough Row, 38 to 46 Marshall Street, and 25 and 26 Masons Yard, mains, services, supply wires, and appurtenances. The St. James' Co. were assessed in respect of the said hereditaments as being of the gross value of 110,000*l.* and of the net annual value of 55,000*l.* The St. James' Co. gave notice of objection to this assessment, but the Assessment Committee increased the gross value to 110,001*l.* and the net annual value to 55,001*l.*, and approved the Valuation List as so altered.

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(1) [1933] 1 K. B. 605.

The undertaking of the St. James' Co. was and is situate wholly within the City of Westminster, and was at all material times carried on for profit under powers conferred and conditions imposed by various statutes. By a Statutory Order, duly confirmed by the Electric Lighting Orders Confirmation (No. 9) Act, 1890 (53 & 54 Vict. c. cxciv.), the Company was authorized to supply electricity throughout the parish of St. James in the City of Westminster.

By the Electric Lighting Act, 1888 (51 & 52 Vict. c. 12), s. 2, the London Electric Supply Act, 1908 (8 Edw. 7, c. clxvii.), ss. 23 to 27, and the London Electric Supply Act, 1910 (10 Edw. 7 and 1 Geo. 5, c. cxl.), s. 1, the London County Council was empowered to purchase compulsorily at its fair market value the undertaking of the St. James' Co. in 1931, or at the expiration of any subsequent period of ten years. By the Electricity (Supply) Acts, 1919 and 1922 (9 & 10 Geo. 5, c. 100, and 12 & 13 Geo. 5, c. 46), Commissioners were established and empowered to determine electricity districts and to formulate schemes for the supply of electricity and to form a Joint Electricity Authority in and for the district so established.

Shortly after the passing of the Act of 1919 the London Electricity Joint Committee (1920), Ld., was incorporated with the object of formulating schemes for the improvement of the organization for supplying electricity within the area of the counties of London and Middlesex and neighbouring counties and districts. This Company incorporated a number of constituent companies, of which the St. James' Company was one.

After holding an inquiry the Commissioners published a scheme constituting the City of London and the counties of London and Middlesex and portions of the neighbouring counties a separate Electricity District and providing for a Joint Electricity Authority for the district.

By s. 13, sub-s. 2, of the Act of 1919 the Commissioners were empowered by any order constituting a Joint Electricity Authority to transfer to such an Authority any right to purchase the whole or any part of any undertaking of authorized distributors which was vested in the local authority for any area comprised in the district of the Joint Electricity Authority. By the London and Home Counties Electricity District Order, 1925, the London and Home Counties Joint Electricity Authority was established.

The London Electricity (No. 2) Act, 1925 (15 & 16 Geo. 5, c. lxiii.), provided for the regulation of the revenue of the St. James' Co. by giving statutory effect to an agreement dated May 27, 1924, and made between the Council of the Administrative County of London, thereinafter called the Council, of the one part, and the London Electricity Joint Committee (1920), Ld., thereinafter called the Company, of the other part. This agreement contained the following clauses :—

" 2. From and after January 1, 1925, or such later date as the Commissioners may determine the dividends of each company being a constituent member of the Company shall be regulated by the price of electricity sold by such company in accordance with the sliding scale set out in the schedule hereto." The schedule provided in s. 1 that "The standard prices shall be such that when applied to the units sold in the last completed year prior to the fixing of the standard prices they shall provide sufficient revenue to meet the costs and charges set out below." These costs and charges were to be ascertained by taking, among other numerous heads of expense, costs and charges, "(9.) For sinking fund calculated in accordance with clause 7 of the foregoing agreement; and (10.) For interest on sinking fund."

Other clauses of the agreement of May 27, 1924, were :—

"6.—(1.) Such of the lands buildings works machinery plant mains apparatus appliances and other like property (hereinafter called 'the physical assets') as form part of any undertaking or of any part of any undertaking of any company being a constituent member of the Company which is purchasable by the Council under the London Electric Supply Act, 1908, and the London Electric Supply Act, 1910, or either of them and as are at the date of transfer to the Joint Electricity Authority comprised in the undertaking or the part of the undertaking so transferred and as shall have been in use or available and suitable for use at the date of the establishment of the Joint Electricity Authority shall on such transfer be transferred by such company to the Joint Electricity Authority free of charge.

"(2.) Such of the physical assets as shall be at the date of transfer comprised in any such undertaking or part of an undertaking of any such company so transferred and as shall have been properly provided subsequent to the date of the establishment of the Joint Electricity Authority shall on such transfer be transferred by such company to the Joint Electricity Authority on the terms that the Joint Electricity Authority shall pay to such company in respect of such transfer a sum equal to the amount expended in providing such assets as shown by the books and records relating thereto less the amount standing to the credit of sinking fund B hereinafter mentioned" . . . .

"7.—(1.) The Company and each company being a constituent member of the Company shall provide a sinking fund A by setting aside annually out of their revenue such sums as with interest thereon will be sufficient to liquidate within such period or periods as may be approved by the Commissioners and in any event by December 31, 1971, the value as shown in the schedule relating to such company provided for in clause 8 hereof of any physical assets of such company which are or may become by the terms of clause 6 hereof transferable by such company to the Joint Electricity Authority free of charge and to liquidate any other sums being at the date of the establishment of the Joint Electricity Authority capital properly expended by such company as shown by their books and records. . . .

"(2.) The Company and each company being a constituent member of the Company shall provide a sinking fund B by setting aside annually out of their revenue such sums as with interest thereon will be sufficient to liquidate within such periods as may be approved by the Commissioners the cost of any assets which may be provided by the Company or any company being such a constituent member as aforesaid and any other expenditure properly chargeable to capital account which may be incurred by the Company or any company being such constituent company as aforesaid after the establishment of the Joint Electricity Authority.

"(3.) Interest on the moneys forming any such sinking fund at the rate allowed for in calculating the annual contribution to such sinking fund shall be paid annually to such sinking fund out of the revenue of the Company by which the sinking fund is set aside and the interest or dividends arising from any investment on account of any such sinking fund shall be included in the revenue of the said company.

"(4.) When any capital asset shall become worn out or disused or be replaced the value or cost thereof standing in the capital account of the Company or any company being a constituent member as aforesaid shall be written off and charged to the appropriate sinking fund.

"(5.) On any transfer to the Joint Electricity Authority of the undertaking or any part of the undertaking of the Company or any such company as provided for by clause 5 of this agreement any sinking fund formed by the Company or any such company shall be retained by the Company or any such company as the case may be." . . . .

The St. James' Co. appealed against the assessments as altered and approved by the Assessment Committee, contending that the sums set aside by them towards the sinking funds A and B, in pursuance of the agreement of May, 1925, had been, and ought not to have been, included in their gross receipts for the purpose of arriving at the rent which a hypothetical tenant might be expected, taking one year with another, to pay for the hereditaments. They insisted that the gross and rateable values shown in the Valuation List should be reduced to 72,664*l.* and 36,332*l.* respectively.

The Assessment Committee rejected the contention that the sums set aside towards the sinking funds should be excluded from the receipts of the Company, but, including these sums, they fixed the gross and rateable value at 89,922*l.* and 44,961*l.* The parties then agreed on a case to be stated under s. 40 of the Valuation (Metropolis) Act, 1869, as aforesaid, for the opinion of the King's Bench Division. The case set out the foregoing facts. The question for the opinion of the Court was whether the contention of the St. James' Co. was correct.

The Divisional Court (Lord Hewart C.J. and Avory and Macnaghten JJ.) upheld the contention of the St. James' Co. and reduced the gross value of the hereditaments to 72,664*l.* and the rateable value to 36,332*l.*

The Assessment Committee appealed to the Court of Appeal, and that Court (Scrutton, Greer and Slesser L.JJ.) held (1) that the contention of the St. James' Co. was not correct, and reversed the decision of the Divisional Court.

The St. James' Co. appealed to this House.

Oct. 23. *Wilfrid Greene K.C.* and *Colin H. Pearson* for the appellants. No doubt in cases in which, as in this case, the undertakers are themselves the only imaginable tenants, the profits basis is to be preferred to the contractor's basis

(1) [1933] 1 K. B. 605.

as a principle on which to ascertain what amount the hypothetical tenant from year to year may be reasonably expected to pay for the hereditament in question: *Kingston Union* v. *Metropolitan Water Board*. (1) In *Port of London Authority* v. *Orsett Union Assessment Committee* (2) Lord Birkenhead L.C. (2) explains what is known as the profits basis thus: From the gross receipts of the undertaking are deducted (*a*) the expense of earning those receipts, (*b*) any deductions provided by statute, including expenses of repairs, insurance and any other outgoings necessary to maintain the hereditament in a state to command a reasonable rent; (*c*) interest on the tenant's capital, and (*d*) the estimated amount of the tenant's profit, including remuneration for his industry. What remains of the gross profits after these deductions is taken as representing the rent which a hypothetical tenant would give year by year for the use and occupation of the hereditament. Thus the gross receipts of the undertakers are first taken and then, after making the appropriate deductions, a balance is ascertained which is supposed to be the rent which the hypothetical will be prepared to pay. But the profits basis is merely a rough and ready method, which in many cases serves its purpose in helping to solve the question what the hypothetical tenant will pay; it is not an infallible test, and its defects lurk hidden in the remaining balance which is supposed to represent the rent. This remaining balance is a collection of heterogeneous items and, where one body has to be regarded as two persons, landlord and tenant, scrupulous care is required to avoid including in this supposed rent items with which the contract of tenancy is not in any way concerned, and which are not incurred in return for any benefit which the tenant derives from the tenancy, but are solely for the advantage of the landlord and his future purchasers of the fee simple of the hereditament. It has indeed been held that where undertakers have by statute power to establish a sinking fund out of revenue for the purpose of redeeming debenture stock and to make payments into that fund out of prices they charge for the commodities

(1) [1926] A. C. 331.

(2) [1920] A. C. 273.

they supply or the services they render, the fact that they have this power cannot be ignored in estimating the rent which a hypothetical tenant will be prepared to give: *Kingston Union* v. *Metropolitan Water Board* (1); and if the undertakers were lessees of waterworks or electric works, and were enabled to create a sinking fund for the replacement of the wasting asset, namely their lease, or if by the terms of their lease they covenanted to pay an increased rent, the increment of which was to be funded to enable them to purchase the reversion of the premises, the increased rent which they actually paid would no doubt be considered in calculating the rent of the hypothetical tenant. In each of these cases the tenant shares in the value of the hereditament as enhanced by reason of the sinking fund. These cases afford no analogy to the present case, where the sinking funds exist solely in order that the future purchasers of the undertaking may acquire it without paying for it. It is hard to see how that fact increases the value of the hereditament from the point of view of the hypothetical tenants, who have no part or share in the sinking funds or in the payments made towards them; the value would seem rather to be diminished because of the gratuitous services they have to render in collecting money with which third parties may purchase the fee simple of the hereditament at a future date. The respondents contended that these payments only come into notice after the profits have been earned, and that the way in which profits when earned are to be applied must be irrelevant in calculating the amount of the profits. That argument merely begs the question whether the payments are to be considered at all in calculating the profits. The appellants contend that they should not be considered.

*Tyldesley Jones K.C.* and *Harold Murphy* were present on behalf of the respondents, but were not called on.

The House took time for consideration.

Nov. 9. Lord Atkin. My Lords, the question before the House arises upon an appeal by one of the large

(1) [1926] A. C. 331.

London electric lighting undertakings in respect of their assessment for rates. Their rateable hereditaments were assessed by the Assessment Committee at 89,922*l.* gross and 44,961*l.* rateable. They seek to establish the values at 72,664*l.* gross and 36,332*l.* rateable. According to the Metropolitan Valuation Act the problem before your Lordships is what annual rent might the Company reasonably be expected, taking one year with another, to pay for the hereditament if the tenant undertook to pay rates and taxes and the landlord undertook to bear the cost of repairs and insurance. It is obvious that when this formula has to be applied to occupiers who carry on such undertakings as mines, docks and harbours, sewage and drainage works, railways, water, gas and electric lighting works, it is inept. In those cases the occupiers generally own the hereditaments on or in which the undertaking is carried on: in some cases they are the sole persons entitled to occupy the premises or carry on the undertaking; in all cases the one inconceivable condition of things is that they should be occupying the hereditaments as tenants from a landlord owner at a rent varying from year to year on the footing that the landlord executed the necessary repairs. Nevertheless the Legislature has refrained from giving any assistance in the matter, with the result that the rights and obligations of occupiers and rating authorities over an important field of rating are determined by rules of law which are entirely based on judicial decisions adopting or modifying the suggestions of rating surveyors and accountants.

Various methods have been adopted for determining what rent a hypothetical tenant might reasonably be expected to pay to a hypothetical landlord in the imaginary circumstances premised in the Act. The most usual system is to adopt the so called "profits basis," which by an interesting development of judicial decision is now held to be the system which ought to be adopted in the absence of special circumstances: *Kingston Union* v. *Metropolitan Water Board.* (1) This system, which seems to be intended to be an application of an economic theory of rent, is founded on an inquiry as to how much the tenant will pay for the privilege of occupying the premises and making what he can out of the undertaking he carries on there. The system roughly speaking is that the gross receipts of the undertaker are taken for the year of calculation; from them are deducted the expenses of earning those receipts; from the residue a tenant's share is subtracted, a hypothetical sum which represents what the tenant might reasonably be satisfied with for his "profits," which will include interest on capital remuneration for his industry and compensation for risk; and the residue will be the landlord's share of rent. I am not proposing to restate the judicial definitions of the profits basis but merely to indicate its general principle. The system is expounded with authority in the judgments in the *Kingston* case. (1) It must be observed that the hypothetical fund which is assumed to be divided is not calculated so as to represent the profits of the undertaking. As was remarked by Greer L.J. in the Court of Appeal (2), it is arrived at before deduction of rent, and I may add that as the landlord's share has to be calculated for the purpose of ascertaining the gross rateable value, the fund is arrived at before deducting the cost of repairs, which are a deduction from the gross to give the rateable. It also follows that the amount of the landlord's or tenant's share of the fund does not depend upon the use to which they put their shares when received, whether voluntarily or under statutory obligation. It is well established, for instance, that sinking funds to satisfy capital obligations whether imposed by statute or not are not permissible deductions in calculating the fund to be divided.

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(1) [1926] A. C. 331.

It remains to consider the application of this system to the present case. At the date of the London Electricity (No. 2) Act, 1925, the London County Council under the provisions of various statutes had an option to purchase the undertaking of the appellants in 1931 on the terms of paying the then value of the physical assets of the undertaking. If not exercised in 1931, the option revived at the end of a further ten years and so on indefinitely. In 1925 the Electricity Commissioners were proposing to set up a Joint Electricity Authority for London and the Home Counties, and an agreement was made between the London County Council and the electric light companies under which the Joint Authority took the place of the London County Council as the ultimate purchaser, the purchase was postponed to a definite date, December 31, 1971, and the existing terms of transfer were substantially altered. For the present purpose all that is necessary to state is that instead of the new authority paying in 1971 the value of the physical assets existing in 1925, they were to have them transferred free of charge: as to assets which came into existence after 1925, they were to pay the difference between cost and the amount of a sinking fund to meet the cost, which is one of the funds in respect of which the present question arises. In order to prevent the undertakers from suffering unfair loss by the proposed transfer, they were to be entitled to include in their charges to consumers for current an amount which would enable them to create a sinking fund which in 1971 would be the equivalent of the value of the 1925 assets. This fund in 1971 would remain the property of the undertakers. Similarly for assets acquired after 1925 a similar fund was to be created, though in respect of such assets it is obvious that in 1971 the fund might not amount to the entire cost. I do not stay to deal with the provisions for fixing a standard price and limiting the undertakers' dividends during the period 1925 to 1971, for in my opinion they have little bearing on the issue. The actual words of the obligation as to the sinking fund are contained in clause 7 of the agreement: "Each company . . . . shall provide a sinking fund A by setting aside out of their revenue such sums as with interest will be sufficient to liquidate . . . . the value . . . . of any physical assets." Similar words are used with reference to the sinking fund B to liquidate the cost of assets acquired after 1925. The agreement was given statutory force by the Act of 1925 above mentioned.

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(1) [1926] A. C. 331.

(2) [1933] 1 K. B. presumably at p. 653.

The question is whether the amounts provided yearly for the provision of the two sinking funds should be deducted before the ascertainment of the hypothetical sum to be divided between the tenant and the landlord. In my opinion the Court of Appeal was right in concluding that it should not be deducted. The sums in question have nothing to do with the expenses of earning the gross receipts, or with repairs: they plainly relate to the application of the balance by the undertakers either as hypothetical tenant or as hypothetical landlord. They are irrelevant to the calculation of rent on the "profits basis"; or indeed on any basis. They do not enter into the picture at all. If indeed one had to consider whether the charge was a landlord's charge or a tenant's charge there seems to be no doubt that almost in its entirety it is a landlord's charge. On the hypothesis he owns the hereditament for which the tenant pays rent. At the end of 1971 the hereditament will pass to the ownership of a third person free of charge. It is the owner for whose benefit the sinking fund is created so far as the physical assets represent the rated hereditament. And, except for relatively unimportant items such as meters and possibly some other plant, the assets to be transferred are identical with the hereditament. It seems plain therefore that the rent to be received should by any measurement include the equivalent of the sums which the landlord must put by if his property is to be protected by a sinking fund. The only value, however, if any, of this consideration is to show that the principle works out fairly when tested in this particular case. As I have already said the particular application of the receipts when once ascertained is immaterial. In my opinion the contention of the appellants fails and the appeal should be dismissed with costs.

Lord Warrington of Clyffe. My Lords, I concur.

Lord Tomlin. My Lords, I also concur.

Lord Russell of Killowen. My Lords, I concur.

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Lord Wright. My Lords, I agree.

*Order appealed from affirmed, and appeal dismissed with costs.*

*Lords' Journals*, Nov. 9, 1933.

Solicitors for appellants: *Sydney Morse & Co.*
Solicitors for respondents: *Allen & Son.*

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[PRIVY COUNCIL.]

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*Oct.* 12.

ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . . . . . . . APPELLANT;

AND

KINGCOME NAVIGATION COMPANY, LIMITED . . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

*Canada (British Columbia)—Legislative Power of Province—Taxation—Tax on Consumers of Commodity—Direct or indirect Taxation—Regulation of Trade and Commerce—Customs and Excise—Fuel Oil Tax Act (Brit.-Col.,* 1930, *c.* 71; 1932, *c.* 51)*—British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *head* 2; *s.* 92, *head* 2; *s.* 122.

The Fuel-oil Tax Act, 1930, of British Columbia, which imposes a tax upon every consumer of fuel-oil according to the quantity which he has consumed, is valid under s. 92, head 2, of the British North America Act, 1867; the tax is direct taxation, because it is demanded from the very persons who it is intended or desired should pay it. As the tax does not relate to any commercial dealing with the commodity it does not fall within the category of customs and excise duties, which are within the legislative powers of the Dominions, both because they are by nature indirect taxes and having regard to s. 122 of the Act. The Act being within the legislative power given by s. 92, head 2, and not purporting to regulate trade and commerce, is not invalid as infringing the Dominion authority under s. 91, head 2, to legislate for that purpose.

Judgment of the Court of Appeal for British Columbia reversed.

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* *Present:* Lord Blanesburgh, Lord Atkin, Lord Thankerton, Lord Russell of Killowen, and Sir George Lowndes.

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APPEAL (No. 32 of 1933) from a judgment of the Court of Appeal for British Columbia (March 7, 1933), affirming a judgment of the Supreme Court of that Province (February 7, 1933).

The appellant sued the respondents in the Supreme Court of British Columbia to recover taxes under the Fuel-oil Tax Act (Statutes of British Columbia, 1930, c. 71), as amended by the Fuel-oil Tax Amendment Act (Statutes of British Columbia, 1932, c. 51). The legislation imposes a tax upon every consumer of fuel-oil according to the quantity which he has consumed. The question arising in the proceedings was whether the legislation was intra vires the Provincial legislature under the British North America Act, 1867. A previous statute of the Province imposing taxation in respect of fuel-oil, namely, the Fuel-oil Tax Act (R. S. B. C., 1924, c. 251), was declared by the Privy Council to be invalid: see *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (1)

The material provisions of the legislation now in question appear from the judgment of the Judicial Committee.

The trial judge (Morrison C.J.) held that the legislation was ultra vires as it imposed an excise tax and therefore was indirect taxation. An appeal was dismissed (Mc Phillips J.A. dissenting). The Chief Justice of the Court of Appeal (J. A. Macdonald C.J.) held that the tax was invalid, both because it was an excise tax and because it infringed the powers of the Dominion legislature to make laws for the regulation of trade and commerce. Martin J.A., while expressing doubt, thought that the appeal should be dismissed. M. A. Macdonald J.A. was of opinion that the Act was invalid, because it imposed an excise duty.

1933. July 3, 4, 6. *Pritt K.C.* and *R. Symes* for the appellant. The tax imposed by the Act was direct taxation within s. 92, head 2, of the British North America Act, 1867, because it was payable by the persons on whom it was intended to fall and was not susceptible of being passed on. [Reference was made to cases mentioned in the judgment.] The tax was

(1) [1927] A. C. 934.

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clearly distinguishable as to its incidence from the tax held to be invalid in *Att.-Gen. for British Columbia* v. *Canadian Pacific Ry. Co.* (1) The majority in the Supreme Court wrongly regarded the tax as an excise duty. Though the word " excise " has sometimes been loosely applied, its meaning since the middle of the last century has been confined to a tax imposed in respect of home-produced commodities before they reach the consumer: O.E.D., s.v. " excise "; Sweet's Legal Dictionary, s.v. " excise "; Mill's Principles of Political Economy (1869), p. 504; Bateman's Excise Laws (1843), p. 4. Where in the judgments of the Board in *City of Halifax* v. *Fairbanks' Estate* (2) and in *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (3) customs and excise duties are spoken of as being indirect taxes the reference is to duties which are imposed in respect of commodities before they reach the consumer and which may be assumed to be passed on in the course of business. The nature of the customs and excise Acts referred to in s. 122 of the Act of 1867 shows that " excise " is there used in the above sense. Even if the tax now in question can properly be described as an excise duty it is valid, because being a direct tax it was authorized by s. 92, head 2. No conflict was intended between that head and s. 122.

*E. C. Mayers K.C.* and *Wilfrid Barton* for the respondents. The decisions lay down that a tax is indirect if there would be a tendency to pass it on; they do not suggest that there can be no passing on unless the commodity on which the tax is imposed is passed on. Fuel-oil was extensively used for the purpose of manufacturing and transport, and the tax would be passed on in the price of the article manufactured or transported. It is sufficient to show that there would be a tendency to pass on the tax in some cases: *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (4); the real nature of the tax was to be ascertained: *Rex* v. *Caledonian Collieries, Ld.* (5)

In *City of Halifax* v. *Fairbanks' Estate* (2) and in *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (3)

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(1) [1927] A. C. 934.
(2) [1928] A. C. 117, 125.
(3) [1930] A. C. 357, 364.
(4) [1925] A. C. 561.
(5) [1928] A. C. 358.

the judgments of the Board laid down that duties of customs and excise were indirect taxes without inquiry into their ultimate incidence. In *Att.-Gen. for Manitoba* v. *Att.-Gen. for Canada* (1) the question had been expressly left open whether the tax was invalid under s. 122 of the Act as being an excise tax. The tax now in question was an excise tax. The meaning of the word "excise," at any rate as used in 1867, cannot be limited as proposed: Johnson's Dictionary, s.v. "excise"; Adam Smith's Wealth of Nations (1863 ed.), p. 396; Burn's Justices Manual (1869), vol. 2, "Excise"; Stephen's Commentaries (following Blackstone), 17th ed., p. 318. An examination of legislation before 1867 shows that duties described as excise were imposed in many cases upon the consumer. Sect. 122 recognized that under s. 91, head 2, or possibly head 3, the Dominion had exclusive power to impose customs and excise duties. If "excise" has the limited meaning suggested the express power given to the Provinces by s. 92, head 9, to impose licensing duties was not necessary. The tax now in question was to be collected like an ordinary excise duty, and with similar powers of search and inquiry. The tax was also invalid, because it infringed upon the power of the Dominion legislature to regulate trade and commerce. The Dominion had exempted fuel-oil from customs duties; the present tax conflicted with that policy, and was for the protection of coal. [Reference was made to *Att.-Gen. of British Columbia* v. *Att.-Gen. of Canada* (2), *Proprietary Articles Trade Association* v. *Att.-Gen. for Canada.* (3)]

*Pritt K.C.* in reply. The Provincial power of taxation is not limited by the Dominion's power to regulate trade and commerce save where the taxing legislation directly interferes with that power: *Burland* v. *The King* (4), *Att.-Gen. for Ontario* v. *Att.-Gen. for the Dominion* (5), *Att.-Gen. of Manitoba* v. *Manitoba Licence Holders' Association* (6), *Board of Commerce Act, 1919.* (7)

(1) [1925] A. C. 561.
(2) [1924] A. C. 222, 225.
(3) [1931] A. C. 310, 326.
(4) [1922] 1 A. C. 215, 220.
(5) [1896] A. C. 348, 360.
(6) [1902] A. C. 73, 80.
(7) [1922] 1 A. C. 191, 198.

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Oct. 12. The judgment of their Lordships was delivered by

LORD THANKERTON. This is an appeal from the judgment of the Court of Appeal for British Columbia dated March 7, 1933, which affirmed, with one dissentient, the judgment of the Chief Justice of the Supreme Court of British Columbia dated January 11, 1933, by which the appellant's action for recovery of tax from the respondent was dismissed.

The appellant seeks to recover the tax by virtue of the provisions of the Fuel-oil Tax Act, Statutes of British Columbia, 1930, c. 71, as amended by the Fuel-oil Tax Act Amendment Act, Statutes of British Columbia 1932, c. 51. The issue in the case is whether the legislation in question is ultra vires of the Provincial legislature in respect either (*a*) that the taxation imposed thereby is not " direct taxation " within the terms of s. 92, head 2, of the British North America Act, 1867, or (*b*) that it invades the exclusive right of the Dominion under s. 91, head 2, to legislate for the regulation of trade and commerce.

The material provisions of the Act of 1930, as amended by the Act of 1932, are as follows :—

" 2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

3. The tax imposed by this Act shall be paid and collected at such times and in such manner as the regulations may prescribe.

4. The amount of any tax imposed by this act may be recovered by action in any Court as for a debt due to the Crown in right of the Province, and the Court may make an order as to the costs of the action in favour of or against the Crown. (2.) In every action for the recovery of any tax imposed by this Act, the burden of proving the quantity of fuel-oil consumed by the defendant, and of proving that the tax has been paid in respect of the fuel-oil in question, shall be upon the defendant. (1932, c. 51, s. 2.)

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5.—(1.) Upon the expiration of thirty days after the commencement of this Act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a licence issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him. (2.) The manner of application and the forms of application and of the licence shall be as prescribed in the regulations. A licence fee of one dollar shall be payable in respect of each licence. (3.) The Minister of Finance may, without holding any formal or other hearing, cancel any licence issued pursuant to this section if the licensee is convicted of any offence against this Act, and may during the period of twelve months next succeeding the cancellation of that licence refuse to issue any new licence to the person so convicted.

6.—(1.) Every collector, constable, and every person authorized in writing by the Minister of Finance to exercise the powers of inspection under this section may without warrant enter upon any premises on which he has cause to believe that any fuel-oil is kept or had in possession, and may inspect the premises and all fuel-oil found thereon, and may interrogate any person who is found on the premises or who owns, occupies or has charge of the premises. (2.) Every person interrogated under this section who refuses or fails to answer any question put to him respecting the fuel-oil kept or had on the premises, or who refuses or fails to produce for inspection or to permit inspection of any book, record or document, or any barrel, tank, or receptacle in his possession or under his control which he is required to produce for inspection or of which he is required to permit inspection, shall be guilty of an offence against this Act.

7.—(1.) Every person who consumes any fuel-oil in the Province and every person who keeps for sale or sells fuel-oil in the Province shall keep such books and records and shall make and furnish such returns as are prescribed in the regulations. (2.) Every person who refuses or fails to keep any book or record or to make and furnish any return prescribed by the regulations, or who withholds any entry or information required by the regulations to be made or entered in any book, record, or return, or who makes any false or deceptive entry or statement in any such book, record, or return, shall be guilty of an offence against this Act."

The respondent challenges the validity of the tax on three grounds—namely: (*a*) That in its nature it is either an import duty or a duty of excise, and therefore falls into the category of indirect taxes; (*b*) that it is not direct taxation in respect that the burden may be passed on; and (*c*) that it invades the legislative sphere of the Dominion parliament in regard to regulation of trade and commerce.

The respondent's first contention is that the tax here in question is a customs or excise duty, according to the general understanding current in 1867, and that all customs and excise duties are outside the competence of a Provincial legislature, apart from any question whether the tax is "demanded from the very persons who it is intended or desired should pay it." For this construction he prays in aid s. 122 of the Act of 1867, and, in order to establish that the present tax was in the nature of a customs or excise duty, he relied on the definitions of political economists and the course of custom and excise legislation in this country up to 1867. In their Lordships' opinion this contention is inconsistent with the decisions of this Board, which go back to the year 1878, and have settled that the test to be applied in determining what is "direct taxation" within the meaning of s. 92, head 2, of the Act of 1867 is to be found in Mill's definition of direct and indirect taxes.

In *Att.-Gen. for Quebec* v. *Queen Insurance Co.* (1), a Provincial tax on policies of assurance was held to be of the nature of a stamp duty and not a licence duty, and to be an indirect tax. The duty was thus described in the judgment of the Board: "They say on the face of the statute, 'the price of each licence shall consist,' and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them ; but whoever does it complies with the Act." It is difficult to conceive a stamp duty to which such a description would not apply, and the Board found it unnecessary to consider the scientific definition of "direct taxation."

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(1) (1878) 3 App. Cas. 1090.

In *Att.-Gen. for Quebec* v. *Reed* (1), a Provincial duty of 10 cents upon every exhibit filed in Court in any action depending therein was held not to be direct taxation, and Mill's definition was applied. Lord Selborne, in delivering the judgment of the Board, said : "The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when it was exigible, or upon anyone else . . . . As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases ; but the best general rule is to look to the time of payment ; and if at the time the ultimate incidence is uncertain, then, as it appears to their Lordships, it cannot, in this view, be called direct taxation within the meaning of the 2nd section of the 92nd clause of the Act in question." It is clear that "ultimate incidence" is not there used in the sense of the political economists, but refers to the ultimate incidence among the parties to the transaction in respect of which the tax is imposed.

Mill's definition was definitely established as the most satisfactory test in *Bank of Toronto* v. *Lambe* (2), in which a Provincial tax on banks varying in amount with the paid-up capital and with the number of their offices, was held to be direct taxation. It may be noted that an argument was unsuccessfully submitted to the effect that the tax would, according to the views of the English legislature, be regarded as a licence or excise duty, at all events for the purpose of collection, and that it was not intended to include any such taxes in the term " direct taxation " in s. 92, head 2. The following passage may be quoted from the judgment of the Board, delivered by Lord Hobhouse : " After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows : ' Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another ; such are the excise or customs. The producer or importer of a commodity is called upon to pay a tax upon it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.' It is said that Mill adds a term—that to be strictly direct a tax must be general ; and this condition was much pressed at the bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point ; nor would they presume to say whether for economical purposes such a condition is sound or unsound ; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind ; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

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(1) (1884) 10 App. Cas. 141, 144.

(2) (1887) 12 App. Cas. 575.

" Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act."

On the terms of that judgment it might have been open to the present respondent to maintain that Mill's definition was not the only alternative as a test, but such a contention is excluded by later decisions of the Board, to which their Lordships will next refer.

In *Brewers and Maltsters' Association of Ontario* v. *Att.-Gen. for Ontario* (1), the Liquor Licence Act of Ontario, which required every brewer and distiller to obtain a licence thereunder to sell wholesale within the Province, was held to be intra vires of the Provincial legislature (*a*) as being direct taxation under s. 92, head 2, and (*b*) as comprised within the term " other licences " in head 9 of the same section. There was a uniform fee of $100 in all cases. This decision disposes of any argument that licences were expressly mentioned in head 9, because they are not direct taxation, and would not have been included in head 2. Further, such a duty would be treated for collection as an excise duty in this country. The decision in *Lambe's* case was followed.

In the case of *Cotton* v. *Rex* (2), which related to succession duties, Lord Moulton, in delivering the judgment of the Board, pointed out that until the Act of 1867 was passed the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of the colonies was concerned, and that there could not be said to have existed any recognized definition of either class which was universally accepted ; but that, as soon as the Act was passed it became essential that the Courts should, for the purposes of that statute ascertain and define the meaning of the phrase " direct taxation " as used in such legislation. After reviewing the three cases already referred to, Lord Moulton stated " Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase ' direct taxation ' in s. 92 of the British North America Act, 1867, is substantially the definition quoted above (i.e., in *Lambe's* case) from the treatise of John Stuart Mill, and that this question is no longer open to discussion."

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(1) [1897] A. C. 231.

(2) [1914] A. C. 176.

These decisions, in their Lordships' opinion, make clear that if the tax is demanded from the very persons who it is intended or desired should pay it, the taxation is direct, and that it is none the less direct, even if it might be described as an excise tax, for instance, or is collected as an excise tax. Among the numerous subsequent decisions of the Board, the respondent was only able to refer to two, as containing any suggestion to the contrary—namely, *City of Halifax* v. *Fairbanks' Estate* (1) and *Att.-Gen. for British Columbia* v. *McDonald Murphy Lumber Co.* (2)

In *Fairbanks'* case a city charter, enacted by the Provincial legislature, imposed a " business tax " to be paid by every occupier of real property for the purposes of any trade, profession or other calling carried on for the purposes of gain. Where the property was let to the Crown or to any person exempt from taxation, the owner was to be deemed to be the occupier, and was to be assessed for business tax according to the purposes for which it was occupied. The property in question was let to the Crown, and the respondent estate, as owner, had been assessed to the tax. It was held that the tax was direct taxation even though the owner probably would seek to pass it on to the tenant. Lord Cave, who delivered the judgment of the Board, stated in regard to the Act of 1867 (3) : " The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act ; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that

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(1) [1928] A. C. 117.
(2) [1930] A. C. 357.
(3) [1928] A. C. 117, 124, 125.

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certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes . . . . On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

What then is the effect to be given to Mill's formula above quoted ? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed ; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation ; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation."

In this passage Lord Cave is dealing with the argument that the probability of the tax being passed on by arrangement rendered the tax an indirect one, and his rejection of that argument is in conformity with the previous decisions of the Board. As has already been pointed out the ultimate incidence of the tax, in the sense of the political economist, is to be disregarded, but where the tax is imposed in respect of a transaction, the taxing authority is indifferent as to which of the parties to the transaction ultimately bears the burden, and, as Mill expresses it, it is not intended as a peculiar contribution upon the particular party selected to pay the tax. Similarly, where the tax is imposed in respect of some dealing with commodities, such as their import or sale, or production for sale, the tax is not a peculiar contribution upon the one of the parties to the trading in the particular commodity who is selected as the taxpayer. This is brought out in the second paragraph of Mill's definition, and is true of the typical custom and excise duties referred to by Lord Cave. Again, taxes on property and income are imposed in respect of the particular taxpayer's interest in property or the taxpayer's own income, and they are a peculiar contribution upon him, and it is intended and desired that he shall pay it, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists. The decision in *Fairbanks*' case is in accordance with the principles already stated by their Lordships as those to be derived from the earlier decisions of the Board.

In the *McDonald Murphy Lumber Co.'s* case (1) a Provincial tax upon all timber cut in the Province, with a rebate of nearly the whole tax in the case of timber used or manufactured in the Province was held to be in its nature an export tax "levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions." The tax was held to be ultra vires of the Provincial legislature for the reasons stated in the following passages of the judgment of the Board, which was delivered by Lord Macmillan (1): "The appellant admitted that the imposition of customs and excise duties is a matter within the exclusive competence of the Dominion Parliament, as, indeed, plainly appears from s. 122 of the British North America Act. The reason for this is, no

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(1) [1930] A. C. 357, 364, 365.

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doubt, that the effect of such duties is not confined to the place where, and the persons upon whom, they are levied, which is perhaps just another way of saying that they are indirect taxes. If then an export tax falls within the category of duties of customs and excise there is an end of the question. Their Lordships are of opinion that according to the accepted terminology and practice of fiscal legislation and administration export duties are ordinarily classed as duties of customs and excise . . . . Mr. Lawrence, however, contended that although the tax might accurately be described as an export duty, this did not necessarily negative its being a direct tax within the meaning of the Act. Without reviewing afresh the niceties of discrimination between direct and indirect taxation it is enough to point out that an export tax is normally collected on merchantable goods in course of transit in pursuance of commercial transactions. Whether the tax is ultimately borne by the exporting seller at home or by the importing buyer abroad depends on the terms of the contract between them . . . . While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristics of an indirect tax as defined by authoritative decisions."

It is clear that this decision applied Mill's definition, as adopted by the previous decisions of the Board, as the test, and that the result was in accordance with those decisions. The present respondent relied on the reference to s. 122 of the Act of 1867 as being of assistance to his argument. In their

Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in the judgments in *Fairbanks'* case and the *McDonald Murphy Lumber Co.'s* case, are duties which are imposed in respect of commercial dealings in commodities, and they would necessarily fall within Mill's definition of indirect taxes. They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a licence duty, such as was considered in *Lambe's* case. Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted. Sect. 122 of the Act merely provided for the temporary continuation of the then existing legislation as regards customs and excise, and the respondent was unable to point to anything in that legislation which would fall outside the above definition of customs and excise duties. It follows that the tax here in question must be tested by Mill's definition, as adopted by the decisions of the Board.

Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot effect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. 92, head 2, of the British North America Act.

The last contention of the respondent was that the Fuel-Oil Tax Act invaded the province of the Dominion Parliament, in

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that it regulated trade and commerce. Except that the Act taxes persons in respect of a commercial commodity, which is not produced in its raw state within the Province, there is nothing in the Act to suggest that its purpose was the regulation of trade and commerce, and the respondent has to rely on extrinsic circumstances such as the competition of coal in the fuel market. But, if the taxation falls within the terms of s. 92, head 2, that is, if it is direct taxation within the Province in order to raise a revenue for Provincial purposes, and it does not purport to regulate trade and commerce, there is no reason to limit the legislative power expressly conferred on the Province. "If they find that on the due construction of the Act a legislative power falls within s. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which would otherwise be open to the Dominion Parliament" (*Bank of Toronto* v. *Lambe*). (1) The case of *Lawson* v. *Interior Fruit and Vegetable Committee* (2), affords an interesting contrast, for there, on the face of the statute, the Provincial legislature sought to regulate the import of commodities.

Their Lordships are therefore of opinion that the appeal should be allowed, that the judgments appealed from should be set aside, and that the appellant is entitled to decree for the amount in suit, and their Lordships will humbly advise His Majesty accordingly. The appellant will have the costs of this appeal and his costs in the Courts below.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *White & Leonard.*

(1) 12 App. Cas. 575, 587.

(2) [1931] S. C. R. 357.

[PRIVY COUNCIL.]

H. R. MUNRO AND OTHERS . . . . . APPELLANTS ;

AND

COMMISSIONER OF STAMP DUTIES . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*New South Wales—Death Duties—Gift—Land subject to partnership agreement with Donor—Benefit not referable to gift—Substance not Form—Real Property Act,* 1900 (*N. S. W.*, 1900, *No.* 25), *s.* 42—*Stamp Duties Act,* 1920–1931 (*N. S. W.*, 1920, *No.* 47, *as amended*), *s.* 102, *sub-s.* 2 (*d*).

In 1909 M., the owner of 35,000 acres of land in New South Wales on which he carried on the business of a grazier, verbally agreed with his six children that thereafter the business should be carried on by him and them as partners under a partnership at will, the business to be managed solely by M., and each partner to receive a specified share of the profits. In 1913, by six registered transfers in the form prescribed by the Real Property Act, 1900, M. transferred by way of gift all his right title and interest in portions of his land to each of his four sons and to trustees for each of his two daughters and their children. The evidence showed that the transfers were taken subject to the partnership agreement, and on the understanding that any partner could withdraw and work his land separately. In 1919 M. and his children entered into a formal partnership agreement, which provided that during the lifetime of M. no partner should withdraw from the partnership. On the death of M. in 1929 the land transferred in 1913 was included in assessing his estate to death duties under the Stamp Duties Act, 1920–1931 (N. S. W.), on the ground that they were gifts dutiable under s. 102, sub-s. 2 (*a*), of that Act:—

*Held*, that the property comprised in the transfers was the land separated from the rights therein belonging to the partnership, and was excluded by the terms of s. 102, sub-s. 2 (*a*), from being dutiable, because the donees had assumed and retained possession thereof, and any benefit remaining in the donor was referable to the partnership agreement of 1909, not to the gifts.

That the transfers did not mention the rights of the partnership, and therefore under s. 42 of the Real Property Act, 1900 (N. S. W.), might in law give a title free from those rights, was not material, because the substance of the transaction had to be ascertained, as liability to taxation ought not to be based upon refinements but on clear words.

Judgment of the Supreme Court of New South Wales reversed.

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* *Present :* LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

APPEAL (No. 14 of 1933) from a judgment of the Supreme Court of New South Wales (September 9, 1932) upon a special case stated under s. 124, sub-s. 1, of the Stamp Duties Act, 1920–1931, of New South Wales.

The main question submitted by the special case was whether certain lands in New South Wales formed part of the dutiable estate of A. G. F. Munro, who died on November 4, 1929, and were chargeable to death duty under s. 102, sub-s. 2, of the above mentioned Act.

The facts of the case and the material statutory provisions appear from the judgment of the Judicial Committee.

The Supreme Court, by a judgment delivered by Davidson J., and concurred in by Street C.J. and James J., held that the lands were dutiable under the Act, the amount of the duty being that which had been assessed.

1933. July 18, 20, 21. *Wilfrid Greene K.C.* and *J. H. Stamp* for the appellants. The property comprised in the gift of 1913 was the lands already subject to the rights of the partnership. Possession of that property was assumed and retained so as to exclude liability to duty under s. 102, sub-s. 2 (*d*) of the Act. The rights of the partnership constituted a distinct interest created before the gift; such benefit or interest as the deceased had in the lands after the gift already existed under the partnership agreement. The arrangement by which the children of the deceased continued to provide pasturage for the partnership livestock was a commercial arrangement for full value to each of them and did not constitute a benefit reserved to the deceased. [Reference was made to *Thomson* v. *Commissioner of Stamp Duties* (1), and to the judgments in that case when before the High Court of Australia (2), also to *Attorney-General* v. *Seccombe* (3) and *Lord Advocate* v. *Stewart*. (4)]

*Gavin Simonds K.C.* and *A. C. Nesbitt* for the respondent. The subject matter of the gift, both in substance and in form, was the fee simple in possession of the land, and the deceased continued to enjoy the benefit of the partnership. The gift

(1) [1929] A. C. 450.
(2) (1927) 40 C. L. R. 394.
(3) [1911] 2 K. B. 688.
(4) (1906) 8 F. 579.

terminated the previously existing licence for occupation and user, and the donor thereafter permitted the deceased to retain an interest as partner. The donor did not assume exclusive enjoyment, but enjoyment in common with the deceased. The argument for the appellants overlooks the final words of s. 102, sub-s. 2 (*a*), which though added in 1930 are in terms retrospective. The decision in *Attorney-General* v. *Seccombe* (1) would have been different had the Act under consideration contained similar words. Having regard to the terms of the transfer and s. 42 of the Real Property Act, 1900.

*Wilfrid Greene K.C.* replied.

Oct. 12. The judgment of their Lordships was delivered by

LORD TOMLIN. This appeal arises out of a special case stated by the respondent for the purpose of having it determined whether certain lands in New South Wales at one time the property of Alexander George Forbes Munro, who died on November 4, 1929, and who will be hereinafter referred to as the deceased, formed part of the dutiable estate of the deceased under the Stamp Duties Act, 1920–24, as amended by the Stamp Duties (Amendment) Act, 1931.

The Supreme Court of New South Wales have decided that the lands in question form part of the dutiable estate of the deceased and the appellants, who are the legal personal representatives of the deceased, have appealed to His Majesty in Council against this decision.

For some time prior to and at the time of the formation of the partnership to which reference will shortly be made, the deceased had been and was carrying on the business of a grazier on three pastoral holdings in New South Wales belonging to him and known respectively as " Boonal," " Weebollabolla " and " Tareelaroi." These holdings (which may for convenience be respectively called the B estate, the W estate, and the T estate) contained in all about 33,501 acres.

The deceased had six children—namely, four sons, Donald, Alfred, Charles and Roland, and two daughters, Lilias and Ada.

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(1) [1911] 2 K. B. 688.

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The youngest of the six children, namely, Roland, attained his majority in April, 1909.

Shortly after that event the deceased entered into a verbal agreement with his six children by which it was agreed that the business of graziers should thenceforward be carried on by the deceased and his six children as partners under a partnership at will.

According to the terms of the verbal agreement of partnership as stated in the special case (1.) the deceased was to contribute the whole of the capital which consisted of the livestock and plant then upon the deceased's three holdings; (2.) the partners were to be entitled to the profits to arise from the business in the following shares, namely, one-fourth was to belong to the deceased, and one-eighth was to belong to each of the six children; (3.) the deceased was to be sole manager of the business and his decisions on all questions relating to the purchase or sale of stock or otherwise in connection with the carrying on of the business were to be binding on all parties; and (4.) the business of this partnership was to be carried on on the three holdings of the deceased.

It is found in the special case that from the date of the verbal agreement for partnership the partnership was carried on upon the three holdings and continued to be carried on thereon up to and on the execution of the transfers and settlements next to be mentioned and thereafter up to the date of an indenture of partnership executed in 1919.

On May 1, 1913, by four memoranda of transfer in the form prescribed by the Real Property Act, 1900, and duly registered in accordance with that Act, the deceased transferred by way of gift to each of his four sons all his right, title and interest in portions of his three holdings. The particulars of these transfers are as follows: (1.) 5818 acres, part of the T estate, were transferred to Donald. (2.) 3864¾ acres, part of the B estate, were transferred to Alfred. (3.) 3063 acres 21¾ perches, further part of the B estate, were transferred to Charles. (4.) 3331 acres 2 roods 32 perches, part of the W estate, were transferred to Roland.

On the same date the deceased by two further memoranda of transfer in the form prescribed by and duly registered in accordance with the Real Property Act, 1900, transferred: (1.) 4740 acres, part of the T estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Lilias and her children. (2.) 4665 acres 1 rood, further part of the T estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Ada and her children.

Under each of the two settlements the trustees were directed to utilize the trust premises in connection with carrying on of farming or grazing pursuits either by themselves or in conjunction with any other person or persons for such time and under such conditions as they might deem advisable.

The result of these transfers was to leave the deceased with about 8020 acres out of the total of 33,501.

The circumstances in which the transfers and settlements were executed were stated in a passage contained in a statutory declaration made by the deceased's son Donald. This passage, which is set out in the special case and is now accepted by the respondent as correct, is as follows: "At the time the said transfers were executed the stock in which the partners were interested were in accordance with the agreement between them running on the land so transferred and the transfers were taken subject to such agreement on the understanding that if any member of the family were desirous of so doing he could withdraw from the agreement as to the running of stock in which the partnership was interested on his holding and work his property with his own stock provided a reasonable time was allowed for the removal of the stock therefrom in which stock the partnership was interested."

On June 23, 1919, a formal partnership deed was entered into between the deceased and his children. This deed departed in some respects from the original verbal agreement of partnership, as it provided that no parties should have the right to retire from the partnership during the lifetime of the deceased.

The business continued to be carried on under the deed of partnership until the deceased's death on November 4, 1929. No part of the lands comprised in the six transfers was ever withdrawn from the use of the partnership.

The respondent assessed the death duty payable on the death of the deceased upon the footing that the estate of the deceased must be deemed to include the lands comprised in the six transfers made by the deceased in 1913 by virtue of s. 102, sub-s. 2 (*d*), of the Stamp Duties Act, 1920–1931.

Sections 101 and part of 102 (so far as material) of the Stamp Duties Act, 1920–1931, are as follows :—

" 101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid (*a*) upon the final balance of the estate of the deceased as determined in accordance with this Act.

" 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property : . . . . (2.) (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The concluding words of paragraph (*d*) viz. " whether enforceable at law or in equity or not and whenever the deceased died " were added after the death of the deceased by the Stamp Duties (Amendment) Act, 1931.

In their Lordships' judgment, having regard to the facts found in the special case and to the passage already quoted from the statutory declaration of the deceased's son Donald, the proper conclusions are that the partnership formed in 1909 continued without interruption until 1919, that under the terms of the verbal agreement made in 1909 the partnership was entitled to the use of the three holdings whatever the ownership of the holdings so long as the partnership continued, and that up to 1913 that right could only be determined by the dissolution of the partnership at will, which did not happen, that the transfers made in 1913 were intended to be subject to the partnership right, and that in connection with the transfers no alteration was made in the partnership agreement except that the right of the partnership was diminished by the stipulation that any member of the family might withdraw from the agreement as to the running of stock on his holding upon reasonable notice.

It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the term of the partnership or a licence coupled with an interest. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and upon this footing it is in their Lordships' opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not in their Lordships' opinion a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not therefore such a benefit as is contemplated by s. 102, sub-s. 2 (*d*). Upon this view of the matter the effect of the words added by the Stamp Duties (Amendment) Act, 1931, becomes unimportant and need not be considered.

But it was urged on behalf of the respondent before their Lordships' Board, although this point does not appear to have been raised below, that the matter must be looked at in a different light because of the form of the transfers and the provisions of s. 42 of the Real Property Act, 1900.

That section provides as follows: "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of the Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever " [with certain exceptions not material to be stated].

Now the transfers in form were expressed to be transfers of the deceased's right, title and interest in the lands comprised in them respectively without reference to any paramount right existing in the partnership and no such right was notified in the folium of the register-book. It may be therefore that the transfers when registered gave a title which overrode in point of law any unnotified right of the partnership. It is not necessary to express any opinion as to the extent of the operation of the words " except in the case of fraud " or how far these words would have had application to any of the transfers in the present case if the donee had insisted upon the absoluteness of the transfer contrary to the terms of the actual bargain.

In their Lordships' opinion it is the substance of the transactions which must be ascertained and if when so ascertained the substance does not fall within the words of the statute it cannot be brought within them merely because the forms employed did not give true effect to the substance. It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words.

Their Lordships are satisfied that the respondent has not in the present case succeeded in making good that s. 102, sub-s. 2 (*d*) of the Stamp Duties Act applies.

The judgment below seems to have proceeded in part upon a misapprehension as to the facts as their Lordships can find nothing to support the statement that in 1913 there was an

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express stipulation that the partnership should continue, and in part upon a view of the law which their Lordships do not think well founded, namely, that if once it is found that the deceased had some benefit from the land that in itself was sufficient to bring the case within the section irrespective of the question whether the benefit was referable or not referable to the gift.

In their Lordships' opinion the appeal should be allowed, the rule below should be discharged, and the first question of the special case should be answered by declaring that none of the lands in question form part of the dutiable estate of the deceased.

Their Lordships will humbly advise His Majesty accordingly. The respondent must pay the costs of the appeal.

Solicitors for appellants: *Snow, Fox & Co.*
Solicitors for respondent: *Light & Fulton.*

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[PRIVY COUNCIL.]

GOULD AND OTHERS . . . . . . . . . . APPELLANTS;
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ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

*New Zealand—Death Duties—Settlement—Gift—Property held as Trustee—Charge on Estate—Debt—Case stated—Admission of Evidence—Death Duties Act,* 1921 (*No.* 21 *of* 1921, *N.Z.*), *s.* 5, *sub-s.* 1; *s.* 9, *sub-s.* 2; s. 62.

In 1918 a resident in New Zealand held mortgages and debentures securing 57,200*l.*, the deeds and certificates being in the custody of his agents, who managed his private affairs under a general power of attorney, and kept accounts relating thereto. He wrote to them giving particulars of a settlement of 30,000*l.* which he proposed to make on his children, and instructing them to take that sum from his capital for the trusts. Thereupon they debited his capital account with 30,000*l.*, and credited it to a special trust account. By the deed of settlement, which was executed by all the necessary parties, the trustees acknowledged the receipt of the 30,000*l.*, and the trusts were declared. No money, however, was paid, nor any securities transferred, to the trustees. Further sums were settled in 1919, 1920 and 1924, similar entries being made in the agents' books. Interest at a flat rate was paid to the beneficiaries on the sums settled on them respectively, the payments being made out of the income received by the settlor from the securities in his agents' custody. Those securities varied from time to time, but the amount always exceeded that settled. Upon the settlor's death in 1928, his estate was assessed to duty under the Death Duties Act, 1921 (N.Z.), as including the settled sums, less capital which more than three years before the settlor's death had been paid out to two of the beneficiaries under power in the settlements, and subject to an allowance for gift duty paid when the sums were settled:—

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* *Present:* LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, LORD WRIGHT, and SIR GEORGE LOWNDES.

*Held*, that having regard to s. 5, sub-s. 1, of the Act the assessment had been rightly made, as the settlements could not be treated as gifts perfected either by transfer of property or declaration of trust; though a charge probably was created upon the settlor's capital it was not a debt for which, by the terms of s. 9, sub-s. 2, an allowance could be made.

Judgment of the Supreme Court of New Zealand [1932] N. Z. L. R. 1464, affirmed upon a different ground.

APPEAL (No. 12 of 1933) from a judgment of the Supreme Court of New Zealand (July 25, 1932) upon a case stated under s. 62 of the Death Duties Act, 1921, of New Zealand.

The appellants were the executors of R. M. Macdonald, who was domiciled in New Zealand and died there on October 21, 1928.

The question raised by the case stated was whether the respondent Commissioner had rightly included either of two sums of 21,600*l.* and 4450*l.*, part of sums settled by the deceased upon his children, in assessing his estate to duty under the above Act.

The case stated came before Adams J., who, after admitting (under s. 5 of an amending Act of 1925) parol and documentary evidence, referred it by consent to the Full Court for further argument.

The Full Court (Myers C.J., and Herman, Adams, McGregor and Blair JJ.) unanimously held that the assessment was rightly made. The grounds of the judgment are stated in the present judgment, and are reported fully at [1932] N. Z. L. R. 1464.

The facts of the case, and the material provisions of the Death Duties Act, 1921, appear from the judgment of the Judicial Committee.

1933. July 13, 14. *M. G. Gresson* and *J. H. Stamp* for the appellants.

*Wilfrid Greene K.C.* and *Blanco White* for the respondent.

Oct. 12. The judgment of their Lordships was delivered by

LORD TOMLIN. Ranald Macintosh Macdonald (who will hereafter be referred to as the settlor) died at Christchurch, in New Zealand, on October 21, 1928, leaving an estate exceeding 300,000*l*. in value.

The question raised by this appeal from the Supreme Court of New Zealand is whether two sums of 21,600*l*. and 4450*l*., being part of moneys alleged to have been settled by the settlor in his lifetime, were properly included in the dutiable estate of the settlor in assessing the death duties payable on his death.

In the year 1918 the settlor was, and for many years prior thereto, had been a sleeping partner in the firm of Messrs. Gould, Beaumont & Co., of Christchurch. That firm, in 1918, had for some years acted, and was acting as the agents of the settlor in the management of his private affairs or of some substantial part thereof, the settlor having in 1915 given a general joint power of attorney to his partners, the appellant, George Gould and Frederick Maurice Warren, and to the firm's accountant, James Morrison. This power of attorney remained in force until the settlor's death.

The firm, in fact, on behalf of the settlor, kept a set of books of account dealing with his affairs so far as they controlled them.

In 1918 the firm had in their custody all the title deeds, certificates and other documents relating to certain mortgages and debentures taken or registered in the settlor's name. At all material times in 1918 the capital amount secured by the mortgages was 52,200*l*., and the capital amount secured by the debentures was 5000*l*., making an aggregate sum of 57,200*l*. Appropriate entries in relation to these investments

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were apparently made in the books kept on the settlor's behalf by the firm, though these entries were not produced either below or before their Lordships' Board.

In or about the year 1919 the business of the firm, together with similar businesses of other firms, were taken over by way of amalgamation by a company formed for that purpose called Pyne Gould Guinness, Ld. After the change the limited company took the place of Messrs. Gould, Beaumont & Co. in the management of the settlor's affairs, and the expression the company, where hereafter used, is intended to refer to the partnership firm in regard to any transaction before the formation of the limited company, and to the limited company in regard to any transaction after such formation.

In 1918 the settlor had living a wife Gertrude, and five children, namely: (1.) Helen; (2.) Guyon; (3.) George; (4.) Ian, and (5.) Mary. All the children were of age except Mary, who attained her majority in September, 1919. The settlor's solicitor in New Zealand was a Mr. Wilding, a member of the firm of Messrs. Wilding & Acland.

On February 28, 1918, the settlor being then with his wife and children in England, wrote to the appellant George Gould the following letter:—

"London, February 28, 1918.

"My dear George,

"Some time back I received a cable from you re settlement on my children saying there was no immediate urgency (probably from the point of view of any change of laws of N.Z.) and that the matter was in Wilding's hands and about two weeks back a cable asking for general particulars of settlement, hence this letter.

"At present I propose to devote 25,000*l.* to the trust on the following conditions; these are very bare but will be a guide to Wilding.

"Settlements made by R. M. Macdonald of 5,000*l.* each (may be added to later) of his children viz. Helen Gertrude (Blakemore) Guyon Kenneth George Ranald Ian Macpherson Mary Moata. Capital to be held in trust as follows: Sons may be paid their capital on attaining 25 years of age. Daughters capital to remain in trust for their children on same lines. If no children may be willed. Trustees to pay at their discretion say one year after death. Intestate cases in family, capital to go equally to rest of family. Sons and daughters to receive all income from their capital. Incomes in deceased daughters estates at trustees' discretion.

"Trustees R.M.M., Gertrude Macdonald eldest son living and George Gould. In case of a vacancy remaining trustees to appoint someone and failing this the Supreme Court to nominate trustees.

"I think that you spoke of a settlement and giving a mortgage on the Hermitage. I don't quite understand the new taxation scheme, but is there any gain in giving a mortgage? In my case it seems to me that it would be better to take enough of my good mortgages and transfer them to these trusts. As I understand it I would have to pay a tax of 5 per cent. on this and in the event of my death within three years of the settlement my estate would have made the amount to full death duty. I am wondering if I cabled you to set aside this 25,000*l.* before March 31 whether I should save my income tax on it. I think that I will try.

"Yours sincerely, R. M. MACDONALD."

"P.S.—This idea I fancy is no use as it is not land and would not alter my income for the period.—R.M."

"P.S. (1/3/18).—On further consideration I have decided to add 2000*l.* to Helen Gertrude Blakemore's amount per 1st sheet making it 7000*l.* (seven thousand pounds) and to Guyon Kenneth's amount 3000*l.* making it 8000*l.* (eight thousand pounds). The increased totals will then give them about the incomes I am now allowing them. This will mean that you will take 30,000*l.* from my capital for these five trusts.—R. M. Macdonald."

After the receipt of that letter by the appellant George Gould, the company acting as agents of the settlor and apparently upon the instruction of the settlor's attorneys opened in the books of account kept by them on behalf of the settlor a special trust account to which they credited a sum of 30,000*l.*, at the same time debiting with a like sum the settlor's capital account in the same books relating to the mortgages and debentures for 57,200*l.*

On April 29, 1918, the appellant George Gould wrote to the settlor as follows: "I think I have omitted in my letters to mention to you that your instructions with regard to a settlement, dated February 28, came to hand and that I immediately put the matter into Wilding's hands. The matter appears perfectly simple and within a week or two we should get the document completed. I understand that Wilding will have it engrossed in duplicate, one copy of which we can sign here as your and Gertie's attorneys, and the second can be sent home to you for your own signature, and that of the trustees and the beneficiaries themselves. Either copy, however, will I understand be sufficient to act upon. The stamping will, of course, cost 1500*l.*, and this is another matter we had to keep in view when making your subscription to War Loan. I do not suppose we can get mortgages to fit exactly the individual amounts of each beneficiary, but we can set aside a sum approximating in total 30,000*l.* and allocate it very closely according to your instructions. In any case I do not suppose a hundred or two one way or the other is of great importance as the amounts so put in trust will be taken account of in your will."

Messrs. Wilding & Acland early in May, 1918, prepared a deed of settlement in duplicate—one of the duplicates, which was dated May 1, was executed by the attorneys of the settlor on his behalf and was stamped with gift duty to the amount of 1500*l.* as a settlement of 30,000*l.* The other duplicate was sent to England for execution by the parties there, together with a deed of delegation to be executed by the trustees who were in England, to provide for the performance of the trust in New Zealand on behalf of such trustees.

In a letter forwarding to the company these documents on May 8, 1918, with instructions as to sending them on to England, Messrs. Wilding & Acland said: "When you receive the deed of settlement and the deed of delegation duly executed, securities to the amount of 30,000*l.* can be transferred from Mr. Macdonald's name to the names of the trustees. It would not be desirable to do this before you receive the deed of delegation as necessity may arise for dealing with one or more of the trust mortgages. In the meantime the mortgages will stand in the name of Mr. Macdonald as trustee for the purposes of the settlement, but beneficiaries under the settlement will be entitled to their incomes as from the time that the settled fund was transferred in your books to the credit of the settlement."

The deed of settlement was expressed to be made between the settlor of the first part, his five children of the next five parts respectively, and the appellant George Gould, the settlor, his wife and the settlor's son Guyon, therein called the trustees of the seventh part.

The deed recited that the settlor being desirous of making provision for his five children had paid to the trustees five several sums of 7000*l.*, 8000*l.*, 5000*l.*, 5000*l.* and 5000*l.*, to be held by them upon the five several trusts thereinafter declared.

The deed then witnessed that in consideration of the natural love and affection which the settlor had for his said children, and in consideration of the five said several sums of money paid by the settlor to the trustees, who were thereby expressed to acknowledge having received the said sums respectively, the trustees covenanted with the settlor and each of the other parties thereto that they would thenceforth hold the said several sums of money so paid to them upon the trusts and with the powers thereinafter declared.

There followed a declaration of trust of each of the five several sums in favour of the five children respectively and their respective issue with a power for the trustees in the case of any son who attained the age of 25 years to pay to him for his sole and absolute benefit any capital money then held in trust for him or his issue.

No money was in fact paid to the trustees nor were any of the mortgages or debentures transferred to them.

In July, 1919, the settlor returned to New Zealand, and on September 30, 1919, decided to increase the trust funds by a further sum of 1000*l.* This was not effected by any payment to the trustees. All that was done was that the special trust account to which reference has already been made was credited by the company with 1000*l.* and the settlor's capital account relating to the mortgages and debentures kept by the company was debited with a like amount. At the same time gift duty was paid on 1000*l.*

The settlor's son Guyon died on November 21, 1919, leaving a widow and two infant children.

On May 20, 1920, the settlor executed a further deed of settlement made between the same parties as the first deed of settlement except that Guyon's executors were joined in place of Guyon as party of the third part, and that Guyon's name was omitted as one of the parties of the seventh part. By this deed the settlor was expressed to settle further sums amounting to 15,000*l.* upon trusts similar to those already existing under the earlier deed of settlement. By this deed it was witnessed that in consideration of the natural love and affection which the settlor had for his children and grandchildren, and in consideration of five several sums of 2000*l.*, 2000*l.*, 4000*l.*, 4000*l.* and 3000*l.* paid by the settlor to the trustees the receipt whereof was expressed to be acknowledged the trustees covenanted with the parties, then to hold the several sums for the purposes therein set forth, being purposes similar to those of the original deed of settlement. Gift duty on 15,000*l.* was duly paid, but no sum was, in fact, paid to the trustees. The same course was pursued as on the previous occasions. The company credited the special trust account and debited the settlor's capital account with the sum of 15,000*l.*

Between the years 1920 and 1923 the settlor was absent from New Zealand, but after his return on July 31, 1924, a further sum of 750*l.* was added by him to the settled funds, and gift duty was duly paid on it. The same procedure was adopted; no money was paid to the trustees, but an appropriate credit to the special trust account and debit to the settlor's capital account were made by the company.

Three other matters require to be mentioned. First the settlor's capital dealt with in the settlor's books of account kept by the company varied from time to time in amount and in the manner of investment. In 1920 it had fallen to 47,825*l.* in value, the holding of mortgages having been reduced to 42,325*l.* Subsequently the amount of such capital increased, and at the settlor's death stood at 112,849*l.* 17*s.* 8*d.*, of which 59,325*l.* were represented by mortgages and the balance by debentures and Government securities.

Secondly from the inception of the trusts the beneficiaries were paid a flat rate of interest, namely, up to September 30, 1922, at the rate of 5½ per cent. per annum, and thereafter at the rate of 6 per cent. per annum.

The interest appears to have been paid in the following way: All the income derived from the investments representing the settlor's capital fund managed by the company was by the company collected and paid into a banking account in the settlor's name. The settlor's attorneys, however, operated the banking account, and at the due times signed as attorneys cheques on such account for the amount required to pay the interest which was distributed by the company between the beneficiaries.

Thirdly, it will be remembered that there was power under the settlement for the trustees to pay out capital to the sons. This power was exercised in favour of Guyon to the extent of 10,200*l.*, in favour of George to the extent of 9200*l.* and in favour of Ian to the extent of 5750*l.* These sums were actually paid. It is not clear from the evidence how they were provided, but as the special trust account was debited with them, presumably they were provided out of the settlor's capital account managed by the company. The total amount of the sums so paid out was 25,150*l.*, and this amount deducted from 46,750*l.*, the total amount settled, gives the figure 21,600*l.* the first item to which this appeal relates.

All the sums paid out were paid out more than three years before the settlor's death with the exception of sums amounting to 4450*l.*, part of the payments made to Ian. This sum of 4450*l.* constitutes the second item to which the appeal relates.

At this stage it will be convenient to call attention to the relevant provisions of the New Zealand statute which governs the matter, viz., the Death Duties Act, 1921 (No. 21 of 1921).

Under s. 2, unless a contrary intention appears "debt" includes any pecuniary liability, charge or encumbrance.

Sect. 3 provides that in the case of every person who dies after the commencement of the Act whether in New Zealand or elsewhere and wherever the deceased was domiciled, there shall be payable to the Crown on the final balance of the estate of the deceased as determined in accordance with the Act a duty (thereinafter called estate duty) at the rate and in accordance with the provisions of the Act, and s. 4 provides that estate duty shall be charged and assessed as a percentage of the amount of the final balance of the estate in accordance with a graduated scale of percentages set out in the first schedule to the Act.

Sect. 5 of the Act, so far as material, is as follow:—

"5.—(1.) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property:—

"(*a*) All property of the deceased which is situated in New Zealand at his death, and to which any person becomes entitled under the will or intestacy of the deceased, except property held by the deceased as trustee for another person:

"(*b*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased within three years before his death, and whether before or after the commencement of this Act, if the property was situated in New Zealand at the time of the gift:

"(*c*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased at any time, whether before or after the commencement of this Act, unless bona fide possession and enjoyment has been assumed by the beneficiary not less than three years before the death of the deceased, and has been thenceforth retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise, if the property was situated in New Zealand at the time of the gift."

The following further provisions of the Act are material :—

" 9.—(1.) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death. (2.) No such allowance shall be made : (*a*) For debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit.

### PART IV.—GIFT DUTY.

" 38.—(1.) In this Act the term ' gift ' means any disposition of property (as hereinafter defined) which is made otherwise than by will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth.

" 39. In this Act the term ' disposition of property ' means : (*a*) Any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity. (*b*) The creation of a trust :

" 40.—(1.) In this Act the term ' voluntary contract ' means a contract entered into, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth. If any contract is made for a consideration in money or money's worth which is inadequate the contract shall be deemed to be voluntary to the extent of that inadequacy.

" (2.) A disposition of property made in performance or satisfaction of a voluntary contract shall be deemed to be a gift, whether the contract or disposition was made before or after the commencement of this Act.

" (3.) A voluntary contract, whether made before or after the commencement of this Act, shall not in itself constitute a gift within the meaning of this Act, but shall become or be deemed to have become a gift so soon and so far as it has attached to and affected the legal or equitable title to any property to which it relates.

"60.—(1.) When the same property is liable both to gift duty and also (upon the death of the donor) to death duty, the amount paid or payable by way of gift duty shall be deducted from the sum which would otherwise be payable in respect of that property by way of death duty, and only the residue (if any) of that sum shall be payable as death duty."

The estate of the settlor after his death was assessed to death duty upon the footing that such estate must be deemed to include the two sums of 21,600*l.* and 4450*l.*, but that allowance ought to be made for the gift duty paid thereon.

Upon objection being taken to this assessment by the settlor's executors, who are the appellants here, a special case was stated under s. 62 of the Act, the question propounded for the Court being whether these sums were rightfully included in the dutiable estate of the deceased in assessing duty.

The Supreme Court of New Zealand were unanimously of opinion that the appeal against the assessment should be dismissed. The learned Chief Justice and other judges of the Supreme Court reached the conclusion upon the facts that the settlor had declared himself a trustee in respect of sums of money equal in amount to those purported to be settled, but that as he paid a fixed rate of interest and retained any surplus income earned by the money the case was brought within s. 5, sub-s. 1 (*c*) of the Act.

Their Lordships, after having heard a full and able argument on either side, are of opinion that the decision of the Supreme Court should stand. Their Lordships have, however, reached that conclusion for reasons which are not identical with those preferred by the judges of the Supreme Court.

In their Lordships' opinion it is not admissible upon the material available to draw the inference that the testator declared himself a trustee of any money or fund.

The settlements themselves were obviously and admittedly bona fide transactions. The question is whether the gifts which the settlements were intended to effect were perfected gifts either by an effective transfer of the property to the

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trustees or by the settlor or other person in whom the property was vested effectively declaring himself a trustee of such property for the purposes of the settlements.

It cannot be contended that there was any effective transfer to the trustees. The credits entered in the special trust account kept by the company could not have that result, and it is not suggested that any money or investment was paid or transferred to the trustees.

It is however contended that the settlor made himself a trustee. He did not do so expressly. If he was a trustee he must have become so by necessary implication from his conduct.

Counsel for the appellants put the matter in two alternative ways, he said that either the settlor declared himself a trustee of thirty-fifty-sevenths of the capital fund existing under the company's management in 1918, being roughly the proportion which 30,000*l.* bore to the nominal value of the fund, or else that he declared himself a trustee of the 57,200*l.* upon trust to permit the settlement trustees to select securities of an amount equal to 30,000*l.*, and that until such selection to permit interest to be paid to the beneficiaries out of the income.

In their Lordships' judgment neither of the alternative views can be supported. Apart from the difficulty of reconciling either alternative with the way in which the fund was actually dealt with neither the property, the subject of the trust, nor the trust alleged to have been declared can, upon the material available, be ascertained with sufficient precision to justify the inference of the existence of a trust.

It follows, therefore, that the settlements cannot be treated as gifts perfected either by transfer of property or declaration of trust.

Their Lordships have little doubt, however, that by the conduct of the parties there was created a charge upon the funds managed by the company in favour of the trustees of the settlements for the sums which the settlor had affected to settle, but such a charge is a debt within the meaning of the definition of debt contained in s. 2 of the Act, and being

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a debt made otherwise than for full consideration in money or money's worth wholly for the settlor's own use or benefit, no allowance can be made for it having regard to s. 9, sub-s. 2, of the Act.

In their Lordships' judgment, therefore, this appeal must fail and be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

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## J. H. COLES PROPRIETARY, LIMITED (IN LIQUIDATION) . . . . . . . . . . APPELLANTS;

AND

## J. F. NEED . . . . . . . . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

*Victoria—Trade or Business Name—Agreement for User—Revocable Licence—Revocation of Licence—Injunction—Deception of Public—Business Names Act*, 1928 (*Vict., No.* 3648), *s.* 25, *sub-s.* 1.

The appellants carried on business at shops in and near Melbourne under trade names which had become associated with their business, and they had the exclusive right to use the names by the Business Names Act, 1928, s. 25, sub-s. 1, as they were registered under the Partnership Act, 1915, as using the names. The appellants verbally agreed with the respondent that he should, at his own expense, open a shop fitted up like the appellants' shops and there sell goods to be bought from them; the respondent, with the appellants' assent painted up over the shop their trade names, his own name not appearing. In the following year the appellants complained that the respondent was buying part of his stock elsewhere and required him to discontinue the use of the names, but an agreement was made that, as a temporary measure, he should purchase elsewhere goods which they could not supply. After some months the respondent was buying from the appellants only ten per cent. of his stock and was finally required to discontinue the use of the names. Upon the respondent refusing the appellants claimed an injunction against him :—

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* *Present:* Lord Atkin, Lord Tomlin, Lord Macmillan, Lord Wright, and Sir George Lowndes.

*Held*, that the respondent had only a revocable licence to use the names, and that as it had been revoked by the appellants they were entitled to an injunction; the evidence did not show that the names had ceased to be distinctive of the appellants' business by reason of their user under the agreement, and if there had been any deception of the public by the appellants it was not fraudulent so as to disentitle them to the relief claimed.

Judgment of the High Court of Australia, 46 C. L. R. 470, reversed.

APPEAL (No. 6 of 1933) by special leave from a judgment of the High Court of Australia (December 23, 1931) reversing a judgment of the Full Court of the Supreme Court of Victoria (June 1, 1931), which affirmed a judgment of Irvine C.J.

The appeal was in an action brought by the appellants against the respondent in the Supreme Court of Victoria, the question for determination being whether they were entitled to an injunction restraining the respondent from using in connection with his business certain trade names.

Upon a motion, which was treated on the trial of the action, Irvine C.J. granted the appellants an injunction as prayed, and his judgment was unanimously affirmed upon appeal to the Full Court.

Upon a further appeal to the High Court of Australia the decision was reversed by a majority (Rich, Evatt and McTiernan JJ.; Starke and Dixon JJ. dissenting). The appeal is reported at 46 C. L. R. 470.

The facts of the case, and the grounds of the judgment, appear from the judgment of the Judicial Committee.

1933. July 21. *James Whitehead K.C.* and *Wilfrid Barton* for the appellants.

The respondent did not appear.

Oct. 12. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellant is a company incorporated and registered in 1927 in Victoria and carrying on business as owner of a warehouse and multiple shops dealing in fancy goods and varieties in and near Melbourne. From the date of the

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company's formation the appellant carried on its business under its own name and under the trade names of "J. H. Coles' Stores" and "J. H. Coles' 3*d.*, 6*d.* and 1*s.* Stores." This business the appellant acquired on its formation from one J. H. Coles, who had carried on the same business for ten years previously under his own name. In 1928 the appellant was registered under the Partnership Act, 1915, as the person carrying on business under these business names, and was accordingly entitled to the benefit of the provisions of s. 25, sub-s. 1, of the Business Names Act (Statutes of Victoria) of 1928, which provides that no firm or firms should use business names identical with business names so registered or so nearly resembling them as to be calculated to deceive. The appellant advertised its business under these names and established an association between the names and the business. Early in 1928 the appellant orally agreed with the respondent that the respondent should take a shop and fit it up in the style used by the appellant, buy from the appellant a complete stock of the goods usually sold in what were known as the Coles Stores, and obtain all future supplies from the appellant at cash prices plus 5 per cent. On the front of the shop which the respondent accordingly took at Northcote, Melbourne, while there was no indication that the respondent was owner, there were painted at the respondent's expense in large lettering the words "J. H. Coles" and "3*d.*, 6*d.* and 1*s.* J. H. Coles' Store." This was done with the appellant's knowledge and assent. The respondent paid the cost of fitting up and running the shop. At first the respondent duly obtained all his stores from the appellant, but after about nine months there were difficulties about supplying him fully and he made some of his purchases elsewhere, to which course the appellant consented as a temporary measure. In August, 1929, the appellant wrote complaining of this course and demanding the removal of its names from the respondent's shop. Again, as a temporary measure it was agreed that the respondent should purchase from others than the appellant what the appellant could not supply.

In June, 1930, the appellant went into voluntary liquidation: by that date the respondent was buying only about 10 per cent. of his supplies from the appellant. In this state of things, the liquidator in December, 1930, required the respondent to remove the appellant's trade names from his shop and discontinue their use in his business, but the respondent refused, and thereupon on January 21, 1931, the liquidator issued a writ claiming (inter alia) an injunction to restrain the respondent from using in the course of his business the appellant's name or the appellants' trade names or any name so nearly resembling that name as to be calculated to deceive or to give the impression that the respondent's business was in any way connected with the appellant's business.

A motion which was by consent treated as the hearing of the action, came before the Chief Justice of Victoria, who on March 10, 1931, granted an injunction as asked. He held that the appellant had granted a licence to the respondent to use the appellant's name, but that no period had been fixed for the grant, and the licence had been duly determined by notice, the implied term of the licence being that it should last as long as the buying and selling on the terms and prices arranged should go on, and that these matters having ceased, the appellant was entitled to revoke the licence. The decision was upheld on appeal by the Supreme Court of Victoria. The main contention of the respondent before that Court was that he had acquired by assignment (limited as to locality) of the appellant's goodwill a right to use the appellant's trade names "permanently or indefinitely." The Court rejected that contention and held that the trade names of the appellant were distinctive of the stores or businesses or of those in which the appellant was interested, and that the appellant had duly revoked the licence which had been granted to the respondent.

The case thereafter came on before the High Court of Australia on appeal. That Court by a majority consisting of Rich, Evatt and McTiernan JJ., Starke and Dixon JJ. dissenting, allowed the appeal and discharged the injunction. The decision of the majority was based on two main grounds

(1.) that the use of the trade names by the respondent under the licence had the effect of rendering these names no longer distinctive of the appellant's business; (2.) that the user by the respondent of these names was a false representation to the public by the appellant who induced the respondent to use these names with the intention that the Northcote public should believe that the Northcote business was owned and controlled by the appellant and on that ground the appellant "could not be accorded equitable relief for its own conduct induced the respondent to sail under false colours from the outset and allowed him to do so for three years." On the basis of these grounds, the majority judges of the High Court held also that the registration did not give the appellant any further or better rights. Starke J., in dissenting, was of opinion that all that the respondent had in respect of the trade names was not an assignment but a licence which was duly determined, that in its inception the arrangement between the appellant and respondent was that the appellant's trade names should be used in connection with the appellant's goods: that furthermore even if the subsequent use of these names when the appellant found difficulty in supplying the respondent had been contemplated, although this might have involved a fraud on the public, yet as the appellant had withdrawn the licence, there was no reason why the public should be further deceived. Dixon J. elaborated the same conclusions. He held that the appellant possessed a trade reputation to which the trade names attached and in addition was entitled to restrain their unauthorized use by the respondent in virtue of the registration and the provisions of the Business Names Act, 1928, which enabled resort to the remedy of injunction to protect the appellant's proprietary interest in the trade names; he was of opinion that there was nothing in the appellant's conduct to disqualify the appellant from the relief sought.

From the order of the High Court the case comes by special leave before this Board.

Their Lordships are in accord with the reasoning of the Chief Justice and of the Full Court of Victoria and of the

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dissentient judges of the High Court of Australia. It may be noted that both the Chief Justice and the Full Court of Victoria proceeded on the basis that the appellant's trade names had not lost their distinctive character and this also was the conclusion of the dissentient judges of the High Court. Their Lordships, after considering the evidence, agree with that opinion, and also with the further opinion of all these judges that all the right that the respondent ever had in regard to the user of the appellant's trade names was a revocable licence to use these names so long as the business arrangement continued between the appellant and respondent. From these conclusions it follows that prima facie the appellant is entitled on well-recognized principles to an order restraining the respondent from the unauthorized use of the appellant's trade names after the licence was revoked, since the continuance thereafter of such user necessarily involves a passing off by the respondent of his business as being a business for the sale of the appellant's goods and as being a business in which the appellant has at least an interest, and in this way there would be practised a deception of the public to the prejudice of the appellant's business reputation and goodwill.

In addition, their Lordships are of opinion that the prohibition contained in s. 25, sub-s. 1, of the Business Names Act, 1928, being for the protection of the registered owner of the names, entitles the appellant to equitable relief on the principles stated by Farwell J. in *Stevens* v. *Chown* (1), in the following words: "If I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so."

Their Lordships are of opinion that this principle applies to the circumstances of the present case, in the sense that the prohibition under s. 25, sub-s. 1, of the Business Names

(1) [1901] 1 Ch. 894, 905.

Act, 1928, involves the jurisdiction of the Court to give effect to the prohibition by injunction; nor is this jurisdiction here excluded by reason of the licence granted by the appellant to the respondent, seeing that the licence was duly revoked.

There remains, however, still to be considered a matter on which the majority of the High Court primarily reached their decision that the appellant was disentitled to relief: that is, that the licence granted by the appellant to the respondent involved a fraud and a deception on the public because it involved a false representation that the respondent's shop at Northcote was owned and carried on by the appellant, and by consequence that, the user of the trade name being tainted by this fraud and deception with the privity or by the procurement of the appellant, the Court ought to refuse him any relief in regard to the trade names, on the principle that he who comes into equity must come with clean hands.

Their Lordships are, with deference, unable to agree with this opinion of the majority of the High Court, and that for more than one reason. In the first place, though it is well established that an action will be barred where the plaintiff is using the trade mark or trade name in aid of a fraudulent trade, their Lordships do not think the rule applies to the facts of this case. It must be carefully considered what is meant by a fraudulent trade for purposes of the rule. If there is put aside the case of trades which are inherently dishonest in their very nature, two illustrations may be given by way of contrast. In *Bile Bean Manufacturing Co.* v. *Davidson* (1), the plaintiff's article was falsely advertized as being made of certain materials and as the discovery of an eminent named scientist: there was there a false representation as to the very article offered for sale, and protection was refused. On the other hand, in *Ford* v. *Foster* (2), the plaintiff, who made and vended shirts under the name of Ford's Eureka shirts, was not debarred from protection of his trade name because he described himself in advertisements as patentee whereas no patent applied: there even if the misdescription could be said to constitute a fraud, it was a collateral matter.

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(1) [1905] 22 R. P. C. 553; [1906] 23 R. P. C. 725.

(2) (1872) L. R. 7 Ch. 611.

The case now in question before this Board is different from either of the two just cited. There was clearly no fraudulent intent on the part of the appellant: the licence in its inception was properly issued, because it was intended that the respondent should only vend goods emanating from the appellant; the trade names of the appellant could therefore be properly applied both to the goods and to the business in which the goods were sold, since for this purpose it is immaterial whether the goods were sold in the appellant's shops or in shops owned by licensees such as the respondent. What happened was that as time went on, the appellant being unable to give full supplies to the respondent, the respondent had to get some supplies elsewhere, and eventually the supplies from sources outside the appellant far exceeded what the appellent was able to supply. But the licence was continued in good faith and in the hope that the difficulties would pass and the goods sold by the respondent be once more, as originally contemplated, goods solely supplied by the appellant. Their Lordships are unable to find any fraud in the original grant of the licence, which in their opinion was made in good faith and in the ordinary course of business and was only continued until it was seen that the original arrangement had finally fallen through, when it was duly revoked. Thereupon the respondent was wrongfully refusing to admit the appellant's rights and was wrongfully claiming to use their trade names without authority and in respect of goods with which the appellant was not connected in any way, and to do so permanently and indefinitely, contrary to the appellant's prohibition.

Their Lordships know of no authority which justifies the holding that in such circumstances as these the respondent should not be prevented not only from infringing the appellant's rights, but also from deceiving the public. Furthermore, even if, contrary to their Lordships' opinion, the appellant authorized, or was privy to, the practising of any deception on the public, the appellant now no longer authorizes, but seeks to stop that deception, and their Lordships do not see any reason why, even if the appellant ever did wrong, he should not be allowed to repent and obtain the prohibition of the Court to stop any such further deception, not only in his own interest, but in that of the public.

Their Lordships may finally observe that the objection under consideration was not taken until the hearing before the High Court. The point does not emerge in any of the affidavits or in any of the judgments of the Courts in Victoria. It is not clear that further evidence might not have been adduced by the appellant if the point had been put forward earlier. But, as their Lordships do not uphold the objection which is made to the appellant's claim to relief, the matter need not be pursued further.

In the result, their Lordships are of opinion that the appeal should be allowed, the order of the High Court of Australia set aside, and the order of the Chief Justice restored: the respondent will pay to the appellant the costs of this appeal and the costs in the Courts below. Their Lordships will humbly so advise His Majesty.

Solicitors for appellants: *Maxwell, Batley & Co.*
Solicitors for respondent: *Dawes & Sons.*

[PRIVY COUNCIL.]

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## ON APPEAL FROM THE PRIZE COURT, ENGLAND.

*Prize Court—Enemy ship—Wrongful sinking—Damages—Treaty of Trianon—Construction of Treaty—"Nationals of the former Kingdom of Hungary"—Fiume—Order in Council—Treaty of Peace (Hungary) Act,* 1921 (11 & 12 *Geo.* 5, *c.* 11), *s.* 1, *sub-s.* 2.

In 1930 the appellants, then and since an Italian corporation, brought an action in the Prize Court claiming damages against the Crown on the ground that in September, 1914, a British cruiser had sunk their steamship while she was proceeding from Havre to Vigo under a safe-conduct issued by the French authorities and confirmed by the British. The ship flew the Austro-Hungarian mercantile flag, and throughout the war the appellants were nationals of Hungary. They contended, however, that the treaty of peace with Hungary (the Treaty of Trianon) was not binding upon them, because before it came into effect they had ceased to be nationals of Hungary, as Fiume, where they were domiciled, had been recognized as an independent state; further, that the treaty, upon its true construction, did not adversely affect their claim.

The Treaty of Trianon provided by section IV., art. 232: "the question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the annex hereto"; and by the annex: "No claim or action shall be made or brought against any Allied or Associated Power . . . . by any Hungarian national, or by or on behalf of any national of the former Kingdom of Hungary, wherever resident, in respect of any act or omission with regard to his property, rights or interests during the war . . . ." An Order in Council declared that the above provisions of the treaty should have full force and effect as law. The Order was made under the Treaty of Peace (Hungary) Act, 1921, and by s. 1, sub-s. 2, of that Act was to have "effect as if enacted in this Act":—

*Held,* that the appellants' right, if any, to claim before an English Prize Court would be property in England, and that the above provision of the annex defeated it. That provision was clearly intended to cover the appellants, and having regard to the terms of the Act of 1921 any English Court, whether in prize or not, was precluded from considering whether in international law the treaty bound those who at its effective date were no longer Hungarian nationals.

Judgment of the Prize Court [1933] P. 22 affirmed upon a different ground.

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* *Present :* LORD ATKIN, LORD TOMLIN, and LORD THANKERTON.

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Appeal (No. 47 of 1933) from a decree of the Admiralty Division, in Prize, dated October 20, 1932.

The facts of the case and the provisions of the Treaty of Peace between the Allied and Associated Powers and Hungary (the Treaty of Trianon) relevant to the judgment of the Judicial Committee appear therein.

A statement of facts agreed by the parties, and a memorandum prepared by the Foreign Office as to the status of Fiume, were put in at the trial and were included in the record upon the appeal.

The case was heard by the President (Lord Merrivale), who, by a judgment reported at [1933] P. 22, held that the circumstances of the case gave rise to a claim which could be entertained by the Prize Court, but that the claim was barred by provisions of the Treaty of Trianon.

1933. Oct. 9, 10, 12. *Stuart Bevan K.C.* and *Sir Robert Aske* for the appellants. The Treaty of Trianon did not affect the appellants' claim. Though it was signed on June 4, 1920, it was not ratified until July 26, 1921. Both by its terms and according to principle the treaty did not take effect until it was ratified: Oppenheim, International Law, 4th ed., vol. i., p. 729; *The Eliza Ann* (1); *The Iloilo.* (2) From March, 1920, the appellants were domiciled and registered at Fiume exclusively, their registration at Budapest being cancelled. The Treaty of Rapallo, by which Italy and Yugoslavia recognized Fiume as an independent state, was formally recognized by Great Britain in February, 1921. Subsequently Hungary by art. 53 of the Treaty of Trianon renounced all title to Fiume. A state is to be regarded by the Courts as a sovereign state upon its recognition by the Crown, and thereupon there is a change in the nationality of its inhabitants: *Doe* v. *Acklam* (3); Keith, Theory of State Succession (1907), pp. 8, 9, 46. The appellants having ceased to be nationals of Hungary, that state was not competent in international law to affect their private rights. But even if

(1) (1813) 1 Dods. 244, 248.
(2) (1925) 20 Am. Jo. Int. Law, 382.
(3) (1824) 2 B. & C. 779, 796.

the treaty was binding upon the appellants, its provisions do not affect their claim. Neither the ship nor the claim were private property or rights in England so as to be within the provisions of art. 232. Some limitation must be placed upon the words "nationals of the former Kingdom of Hungary." They were not intended to cover persons or corporations in the position of the appellants. Of the decisions in *Rothschild* v. *Administrator of Austrian Property* (1); *Bohemian Union Bank* v. *Administrator of Austrian Property* (2); and *Groedel* v. *Administrator of Hungarian Property* (3), the last alone related to the treaty now under consideration. So far as the decisions are not distinguishable it is submitted that they were erroneous. Further, by an agreement made in January, 1930, between the governments of the creditor nations, including Great Britain, and Hungary, the right of retention of property belonging to nationals of the former Kingdom of Hungary ceased to be exerciseable.

[LORD ATKIN. Their Lordships are of opinion that, as a matter of construction, the appellants' claim is covered by the provisions of the treaty.]

*Sir Donald Somervell S.-G.* and *Hubert Hull* for the respondents. Even if the appellants ceased to be nationals of Hungary before the treaty came into effect, which is not admitted, its provisions are binding upon them. When the *Bathori* was sunk they were nationals of Hungary. It is convenient and customary that a treaty made at the end of a war should deal with all acts between the belligerent parties. In 1915 the British Government expressly stated that the claim would be so dealt with. The only state which by international law can complain of a wrongful act to a person or his property is the state of which he was a national when the act was committed: Burchard, Diplomatic Protection of Citizens Abroad (1921), art. 306, p. 660; Oppenheim, vol. i., art. 155 (*b*), p. 296. In *The Blonde* (4) the Judicial Committee rejected the contention that a company registered in Danzig, which had become a free city, was not

(1) [1923] 2 Ch. 542.
(2) [1927] 2 Ch. 175.
(3) (1927) 44 Times L. R. 65.
(4) [1922] 1 A. C. 313, 338.

bound by the Treaty of Versailles. In any event if the terms of the treaty cover the claim the appellants cannot contend that they are not bound, because by the combined effect of the Treaty of Peace (Hungary) Act, 1921, and an Order in Council made under it, the provisions relied on by the respondents were given the effect of an Act of Parliament. The agreement of 1930 related only to the charge effected by art. 232 (1.) (*b*); it cannot be applied to validate a claim which apart from it was invalid.

*Sir Robert Aske* in reply. The Act and Order in Council of 1921 not having been relied on before the President, cannot be relied on now. The Act was not pleaded. In any case they should be read if possible so as to accord with international law: *The Zamora* (1); *Le Louis* (2); *The Annapolis.* (3)

Nov. 3. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from a decree of the President, Lord Merrivale, sitting in Prize, by which he pronounced against the claim of the plaintiffs, the present appellants, and condemned them in costs. The appellants are a corporation now established under Italian law. Their nationality for a period after the war has been in dispute; but it is undisputed that before and during the war they were nationals of Hungary. They are a shipping company and carry on business at Fiume. On July 25, 1914, the steamship *Bathori*, of 2223 tons gross register, owned by the appellants and sailing under the Austro-Hungarian flag, left Mazarelli for Rouen with a mixed cargo consisting of beans, apples, flour, paraffin, insect powder, beech sleepers, staves and elder blossoms. She reached Havre on August 5, 1914, and while there the cargo was discharged by order of the French authorities. Discharge was completed on August 28, and the next day the ship sailed in ballast for Vigo under a safe-conduct issued by the French authorities and confirmed by the British Consul-General at Havre. On September 1, when on the high seas about thirty miles from Vigo, she was

(1) [1916] 2 A. C. 77.

(2) (1817) 2 Dods. 210.

(3) (1861) 30 L. J. (P. & A.) 201.

stopped by H.M.S. *Minerva*. The commander (the defendant Captain Warleigh) apparently thought that the *Bathori* was violating the terms of the safe-conduct, and after removing the master and crew ordered her to be sunk. On representations made on behalf of the Austro-Hungarian Government, the British Government on January 19, 1915, admitted that a mistake had been made and undertook to consider the question of pecuniary liability on the resumption of friendly relations and "as part of the general settlement of claims on both sides which may then arise."

On May 6, 1930, the plaintiffs commenced the present proceedings in prize, claiming compensation for the loss of the ship and the effects of the master and crew. Before the President the question was debated whether the circumstances gave a right to claim in prize. The President determined this point in favour of the plaintiffs, and his decision in this respect was not challenged before this Board. It became necessary, therefore, to consider the defences raised in the answer of the defendants, which alleged that the claim was barred by the provisions of the Treaty of Peace between Hungary and the Allied Powers (the Treaty of Trianon), or was subject to the charge created by the same treaty and the Orders in Council made for the enforcement thereof. For the purpose of this case their Lordships find it only necessary to deal with the defence that the claim was completely barred.

The Treaty of Trianon was signed on June 4, 1920. It provided that it was to come into force from the date of ratification. On July 26, 1921, ratifications were exchanged. On August 24, 1921, the treaty was registered with the League of Nations. Part X. of the treaty is headed "Economic Clauses." It includes section III., "Debts," art. 231, with annex, and section IV., "Property, Rights and Interests," arts. 232, 233, with annex. Art. 232 (1.) provides: "The question of private property, rights and interests in an enemy country shall be settled according to the principles laid down in this section and to the provisions of the annex hereto." By the annex, clause (2.), it is provided as follows: "No

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claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Hungary or by any Hungarian national or by or on behalf of any national of the former Kingdom of Hungary wherever resident in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly, no claim or action shall be made or brought against any person in respect of any act or omission under or in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power."

On May 12, 1921, the Treaty of Peace (Hungary) Act, 1921, was passed by the British legislature. It enacts: (1.) "His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty, and for giving effect to any of the provisions of the said Treaty."

(2.) "Any Order in Council made under this Act . . . . shall have effect as if enacted in this Act."

On August 10, 1921, after the ratification of the Treaty of Trianon, an Order in Council was made, the Treaty of Peace (Hungary) Order, 1921, which, after reciting the Treaty of Trianon and the Treaty of Peace (Hungary) Act, 1921, ordered: "(1.) The sections of the Treaty set out in the schedule to this Order shall have full force and effect as law." It further proceeded to make provisions for carrying out the sections. Included in the scheduled sections is section IV., with annex, including clause 2, as set out above. The defendants maintain and the President has held that the terms of this clause bar the plaintiffs' claim.

The plaintiffs contend that the annex must be read subject to the general provisions of art. 232, which is expressed to cover property, rights and interests in an enemy country. The *Bathori*, it is said, was sunk on the high seas, and was never for relevant purposes in the United Kingdom as an enemy country. Their Lordships, however, have no doubt that the plaintiffs' right, if any, to claim in prize before an

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English Prize Court would be property in England, and that clause 2 of the annex operates to defeat this right of property. The plaintiffs thereupon further objected that they had, by virtue of the Treaty of Rapallo, made between Italy and Yugoslavia, and ratified by those two states and recognized by England before the Treaty of Trianon came into force, been divested of Hungarian nationality and had assumed the nationality of the independent state thereby established. The result was to prevent clause 2 of the annex from applying to them, for the article could only be intended to apply to those persons who were nationals of Hungary at the time the treaty came into force. No country could, it was said, be supposed to purport to surrender private rights of persons who were not within its protection at the moment of surrender. Such a surrender would be inoperative in international law, and the language of the treaty, however general, should be construed so as to limit its operation to cessions that could be validly made.

This contention gave rise to interesting arguments which involved the nationality of residents of Fiume at different dates after the war. It further raised the important question mentioned above as to the validity in international law of stipulations in treaties purporting to affect the private property of ex-nationals no longer nationals of the contracting states. In the opinion of their Lordships, it is unnecessary to decide these problems in the present dispute. Whether the plaintiffs were or were not Hungarian nationals at the effective date of the treaty, their Lordships have come to the conclusion that the clause in question plainly was intended to cover them. The treaty was the treaty of peace between Hungary and the Allied Powers, and it appears reasonably clear that the intention of the parties was that for acts or omissions done to the property of Hungarian nationals during the war those nationals should have no redress whether they did or did not continue to be Hungarian nationals up to the date of the treaty. Whether for acts done before the acquisition of new nationality the new state can or will exercise protection, or whether the former state can exercise protection, may be debatable; but in the circumstances attending a peace treaty it appears very natural that the former state should be required to renounce protection for its ex-nationals, and in the present treaty it seems clear that Hungary did so act.

This, however, determines only the question of construction. If the treaty operated by international law only, the tribunal in Prize might well have had to determine how far Hungary's attempt to affect the rights of ex-nationals could be treated as effective. But for an English Court, whether in Prize or not, this question is precluded by the terms of the Treaty of Peace (Hungary) Act, 1921. The Orders in Council made under it are to have effect as if enacted in the Act. The Order provides that the scheduled sections of the treaty are to have full force and effect as law. If, therefore, the clause in question bears the construction which has already been imputed to it, that construction must be enforced in British Courts as law. It follows that the claim of the plaintiffs is barred by the clause. It does not appear that the contention as to the invalidity of the clause in international law was raised before the learned President, or that the effect of the statute was brought to his attention. The statute was not in terms pleaded, though the Orders in Council were referred to in the plea raising the question of the charge with which the Board have not found it necessary to deal. No circumstances exist, however, which preclude the defendants from relying on the terms of the statute on appeal to His Majesty in Council, and no extra costs can have been incurred by reason of reliance on it being belated.

Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must bear the costs of the appeal.

Solicitors for appellants: *Swepstone, Stone, Barber & Ellis.*
Solicitor for respondent: *Treasury Solicitor.*

[PRIVY COUNCIL.]

## IDEWU INASA AND OTHERS . . . . APPELLANTS;

AND

## SAKARIYAWO OSHODI . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

*Nigeria—Lagos—Native Law and Custom—Native Compound—Eviction by Chief—Supreme Court Ordinance* (*Nigeria*, 1923, *c.* 3), *s.* 20.

If the occupier of a dwelling in one of the native compounds at Epetedo, Lagos, asserts a right therein inconsistent with the lawful rights of the chief, the chief is entitled by native law and custom to evict not only the offending occupier but also those of his relatives who have supported or sided with him against the chief. The custom, thus limited as to the relatives liable to be evicted, is not repugnant to natural justice, equity and good conscience so as to be one from which judicial sanction must be withheld. The Judicial Committee were not prepared, without further argument, to uphold the custom so far as it was stated to include a right to evict all the relatives; that extension was not necessary for the decision of the case.

A chief should not proceed to eviction without obtaining from the Court a declaration of forfeiture; if he does so he will be required very strictly to justify his conduct if it is called in question in subsequent proceedings.

Judgment of the Supreme Court of Nigeria affirmed.

APPEAL (No. 64 of 1932) from a judgment of the Full Court of the Supreme Court of Nigeria (February 26, 1930) affirming a judgment of Tew J. (February 22, 1929).

The seven appellants brought an action in the Supreme Court of Nigeria against the respondent chief claiming damages, and other relief, alleging that they had been unlawfully evicted by him from rooms and holdings in Inasa Court, one of twenty-one compounds at Epetedo, Lagos. The respondent chief by his defence pleaded (inter alia) that in the circumstances of the case he was entitled under native law and custom to evict the appellants; he denied that the evictions had been carried out in an unlawful manner.

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* *Present:* LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

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The facts appear from the judgment of the Judicial Committee.

The trial judge (Tew J.) dismissed the action, and his judgment was affirmed on appeal by the Full Court (Kingdon C.J., and Webber and Petrides JJ.).

The Supreme Court Ordinance (Laws of Nigeria, 1923, c. 3), s. 20, provides—" Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any existing native law or custom, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any local enactment . . . . "

1933. July 27. *R. F. Irving* for the appellants.

*Horace Douglas* for the respondent.

Reference was made to *Sakariyawo Oshodi* v. *Moriamo Dakolo* (1), and to six judgments (appended to the record in the appeal) of the Supreme Court relating to the compounds at Epetedo ; also to *Doe* d. *Ellerbrook* v. *Flynn* (2) and *Vivian* v. *Moat.* (3)

Nov. 9. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The action out of which this appeal arises was brought by the appellants in the Supreme Court of Nigeria to recover possession of certain rooms and holdings in Inasa House, Inasa Court, Epetedo, from which, as they alleged, they had been forcibly and illegally evicted by the respondent chief. Before the trial judge—Tew J.—the action failed. An appeal to the Full Court was no more successful. From its order of dismissal of February 26, 1930, appeal has now been taken by the original plaintiffs to His Majesty in Council.

The relation in which the appellants stood to the respondent at the time of their eviction from Inasa House is traceable to a transaction in the year 1862, when an area of land at Epetedo was put by the Government of Lagos into the possession of Chief Oshodi Tappa for the occupation of his family, followers and slaves. Chief Oshodi Tappa was the father and predecessor of the respondent, upon whom his rights as chief have devolved.

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(1) [1930] A. C. 667.
(2) (1834) 1 C. M. & R. 137.
(3) (1881) 16 Ch. D. 730.

Oshodi Tappa divided the area into twenty-one courts or compounds. Inasa Court was one of these. Alfa Iwo Court, the rights in which were considered by the Board in *Sakariyawo Oshodi* v. *Moriamo Dakolo* (1), was another. The interests of the occupiers in each compound are in principle the same. A compound it seems normally consists of a set of houses round an internal court, which forms the access to them. Oshodi Tappa placed a headman in charge of each court. Inasa (sometimes referred to as Nasah), a head slave of his, was the headman put in charge of Inasa Court, and the other persons assigned to that court were also slaves of Oshodi Tappa. Inasa duly parcelled out the compound among these slaves (including himself), each slave being allotted a portion for the exclusive occupation of himself and his family. Inasa is now dead. The appellants with Amodu, later to be mentioned, are his surviving children and grandchildren, and prior to the eviction of which they here complain they were it seems severally in occupation of separate rooms of the houses originally appropriated by Inasa to himself and his family.

In or about the year 1869 the Governor of Lagos issued Government grants in respect of each of the courts. The different headmen were encouraged to take these grants in their own names. The grant in respect of Inasa Court was dated May 5, 1869, and the name inserted in it was that of Inasa or Nasah. It cannot be doubted that this act of Government was a source of misunderstanding, as each grant, on its face, purported to be a disposition in absolute terms in favour of the grantee. But it was at an early stage settled, although apparently not always accepted, that these grants were only grants in trust, and that they left the interests in the properties, whether those of the occupiers or those of the chief, exactly where they had been.

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(1) [1930] A. C. 667.

The interests of the occupiers were defined in the following terms by Lord Dunedin, delivering the judgment of the Board in the case already cited : " These various occupiers have the right to remain and to transfer their holdings to their offspring, but in the event of the family of an occupier failing and being extinct the chief has a right of reversion."

Two further matters upon which the Board then pronounced may here be conveniently referred to. Their Lordships accepted as correct the view that the right of the Oshodi family and of the chief on its behalf to control the compounds at Epetedo had always, and rightly, been judicially recognized. They held, however, that the internal court in each compound did not remain, as had been contended by the chief, his property in possession. The court had never been in his actual possession. " It was used in common by all the inhabitants of the houses, and must be considered as being held along with the houses as an undivided share."

It is interesting, and for present purposes, helpful, to ascertain what was the question in that case at issue before the Board, and then to note how it was resolved. The Governor of Nigeria had given notice of his intention to acquire for public purposes the Alfa Iwo Court compound. The problem was to determine who the persons were to whom the compensation moneys were to be paid. On the one hand, these moneys were claimed by the respondent Oshodi as paramount chief. On the other hand they were claimed by the various occupants of the houses cited as defendants. In the result their Lordships, after describing the position of the occupants in the terms already stated, held that the compensation must be distributed amongst them subject only to a reservation of some part of it to the chief in respect of his possible right of reversion which was cut off for ever by the compulsory acquisition. The judgment proceeds as follows : " The plaintiff has not exercised any rights of eviction, if he had any such, in respect of any of the present occupants, and counsel for [him] quite properly explained that he did not propose to ask anything in respect of such rights of eviction if they existed, as seems possible from the history of the various occupants given by the trial judge. It is clear that the possible right of reversion on the failure of the family of any of the occupants though not actually elusory, must be of small value." In the result, as has already been indicated, substantially all the compensation money for the land in question went to the occupiers.

Now it is with the chief's eviction rights, which in the Alfa Iwo Court case were so lightly regarded, that the present litigation is concerned. These rights, whatever they may be, depend entirely on local law and custom, and in considering both their range and the question whether they can, to the full extent, be judicially recognized, the judgment of the Board in the Alfa Iwo Court case in which the interests of the occupants in their respective holdings were described in terms very extensive must always be borne in mind. Their Lordships think it more than likely that some of the observations of the Full Court in this case would have been qualified had that Court had the advantage enjoyed by their Lordships of considering the Board's authoritative exposition of the relative positions of the two parties in the judgment referred to, delivered, in fact, nearly six months later. As will be seen, however, on the facts of this particular case, upon which there are concurrent findings in the Courts below, their Lordships have no difficulty in adhering to the conclusion there actually arrived at.

The facts immediately antecedent to the dispute can now be shortly stated.

In 1918 Amodu (or Aworan) Inasa, already mentioned, the eldest son of Inasa, by this time deceased, purported by an indenture of November 15, duly registered in the register of deeds at Lagos, to sell and convey to one Alimotu Orifunke a portion of Inasa Court.

In 1925 Chief Oshodi, the present respondent, instituted an action in the Supreme Court of Nigeria in which he sought a declaration that Amodu "has lost his right, title and interest under native law and custom to that piece of land which he now occupies as a descendant of a domestic at Inasa Compound at Epetedo, Lagos, by selling and/or attempting to sell or otherwise dispose of a piece or parcel of land situate at Glover Street, which forms part of Inasa Compound."

This declaration was sought for on the view that by the relevant native law and custom an occupier in such a compound as Inasa may not sell or otherwise alienate the right of occupancy or any part of the land nor may he wrongfully assert any right inconsistent with those lawfully belonging to the chief, who is entitled as representing the Oshodi family to eject any occupier for breach of such rights and reallot his holding to others.

Accepting these views as sound, so far as they covered the case before him, Tew J. granted against Aworan Inasa the declaration craved. No appeal against that declaration was taken, and it is relevant to note that its propriety has not since been questioned in these proceedings or at all.

Now Aworan Inasa was the only defendant to the action in which the above declaration was made. No other member of the family was party to the proceedings. The respondent however at once took up the position that the extinction of Aworan's interest in the compound by the decree against him carried with it the forfeiture of all right, title and interest in Inasa House of each and all of his relatives, and on January 21, 1926, five days after the judgment of the Court against Aworan, the respondent exhibited in Inasa Court a printed notice in the following terms:

"Occupiers of rooms in Inasa House are hereby notified to remove within 7 days of the date of this notice to save them being turned out unceremoniously.

SAKA OSHODI,
"21st January, 1926. Chief."

A few days later the respondent, accompanied by several of the leading members of the Oshodi family, went to Inasa Court and evicted from their rooms in Inasa House such members of Aworan's family as had not already removed themselves therefrom in compliance with the respondent's notice.

The members of Aworan's family so evicted were brothers, sisters, nephews and nieces.

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It has been found, and the position is now accepted, that the removal just referred to was effected without any unnecessary violence, and it was not until June 23, 1928, two years and a half later, that the present action was commenced. Thereby, the appellants, the evicted relatives of Aworan, claimed (1.) recovery of possession of their rooms and holdings at Inasa Court : (2.) damages for unlawful and forcible ejection and (3.) an account of all rents and profits since collected by the respondent therefrom.

The respondent's answer to claims (1.) and (3.)—claim (2.), as has been seen was not pressed—was that the appellants by the native law and custom, as already stated, had forfeited all their rights in their respective portions of Inasa's original allotment in Inasa Court. In support of that view, he adduced evidence to the effect that where a chief has ejected a domestic for misconduct he is entitled to eject his relatives also. It is left doubtful, on that evidence, whether the custom involves all relatives in this condemnation, irrespective of whether they approved of or encouraged the misconduct complained of, or were indifferent to it or ignorant of it, or even disapproved of it. The learned trial judge, however, interprets the evidence as affecting only those relatives of the offender who sympathized with him and, in fact, he finds that the relatives of Aworan including the appellants had taken his side against his chief in a long standing dispute, the claim by the family, based doubtless on the terms of the grant to Inasa, being that the chief had no rights whatever in the Inasa compound. In this finding, as their Lordships read its judgment, the Full Court agrees, and accepting it as a concurrent finding, as in a case of this kind their Lordships must, all difficulty disappears. When the chief's control over the compound is recalled, to say nothing of his reversionary interest therein, it cannot, they think, be held that a native custom so limited is repugnant to natural justice, equity and good conscience, so that judicial sanction to it must be withheld.

As at present advised, their Lordships, however, are not prepared, without further argument, to uphold any native custom in this matter going beyond that which has now been affirmed.

On one point their Lordships are in full agreement with both Courts in Nigeria. In this case the respondent took the law into his own hands, putting forward no justification for his failure or omission to add the appellants as defendants in his original action against Aworan and to claim as against them the same declaration. Such procedure on the part of the respondent is to be deprecated, and it will be checked in future cases if it is made plain, as it should be, that when a defendant takes the law into his own hands and proceeds to eviction he will be required very strictly to justify his conduct when in any subsequent proceeding that conduct is called in question.

In the present case the respondent, on the facts found, has justified his claim, and their Lordships will accordingly humbly advise His Majesty that this appeal be dismissed and with costs.

Solicitors for appellants: *E. F. Hunt & Sherrin.*
Solicitors for respondent: *Oldfields.*

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## [PRIVY COUNCIL.]

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*Nov.* 28.

J. E. DAVID . . . . . . . . . . Appellant;

AND

S. P. A. DE SILVA . . . . . . . . . Respondent.

### ON APPEAL FROM THE SUPREME COURT OF CEYLON.

*Ceylon—Business Names Registration—New business in own name after registration—Failure to notify change—Suit on contract in respect of new business—Registration of Business Names Ordinance (No.* 6 *of* 1918, *Ceylon), ss.* 7, 9.

A person who has registered himself under the Registration of Business Names Ordinance, 1918, of Ceylon, as carrying on in a business name a specified business, and as having no other business, is not precluded by s. 9 of the Ordinance from suing upon a contract made by him in respect of a different and entirely separate business which he has commenced in his own name after the registration, although he has not notified, as required by s. 7, that there has been a change in the registered particulars in that the registered business is no longer his sole business.

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* *Present:* Lord Thankerton, Lord Alness, and Sir Lancelot Sanderson.

Judgment of the Supreme Court of Ceylon reversed.

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APPEAL (No. 11 of 1931) from a decree of the Supreme Court of Ceylon (September 1, 1930) reversing a decree of the District Judge of Colombo (September 20, 1929).

The appellant brought a suit in the District Court claiming damages for breach of a contract made by him in respect of a timber business, which it was found by both Courts in Ceylon he was carrying on in his own name. Before commencing to carry on the business he had effected registration under the Registration of Business Names Ordinance, 1918, in respect of a business as an accountant and auditor which he carried on in the name J. E. David & Co.

The Supreme Court (reversing the decree of the District Judge) dismissed the action. The learned judges held that, having regard to ss. 2 (*b*), 4 and 7 of the Ordinance, the appellant was bound to notify that he had commenced to carry on the timber business, and that as he had not done so he was precluded by s. 9 from maintaining the suit.

The facts and the material terms of the Ordinance appear from the judgment of the Judicial Committee.

1933. Nov. 9, 10. *Upjohn K.C.* and *A. W. Elkin* for the appellant.

*H. I. P. Hallett* for the respondent.

Nov. 28. The judgment of their Lordships was delivered by

SIR LANCELOT SANDERSON. This is an appeal by the plaintiff from a decree of the Supreme Court of Ceylon dated September 1, 1930, which reversed a decree of the District Judge of Colombo dated September 20, 1929, made in favour of the plaintiff.

The suit was brought by the plaintiff Jonathan Edward David against the defendant S. P. A. de Silva for damages for breach of a contract dated December 10, 1927, and for the recovery of certain sums advanced by the plaintiff to the defendant. Among other defences the defendant alleged that the plaintiff could not maintain the action because he had not complied with the provisions of Ordinance 6 of 1918, called an Ordinance for the Registration of Business Names. All the defences failed in the trial Court and it was decreed that the defendant should pay to the plaintiff Rs.10,015 with interest, and the costs of the action, and the defendant's claim in reconvention was dismissed. The defendant appealed to the Supreme Court, which allowed the appeal on the above mentioned ground, and dismissed the plaintiff's suit without prejudice to his right to bring the suit afresh if the default be cured.

The only question arising on the plaintiff's appeal to His Majesty in Council is whether the construction of the above mentioned Ordinance for the Registration of Business Names adopted by the Supreme Court is correct and whether the plaintiff by reason of the said Ordinance was debarred from bringing the action.

The material portions of the Ordinance are as follows :

" Whereas it is expedient to provide for the registration of firms and persons carrying on business under business names and for purposes connected therewith : Be it therefore enacted by the Governor of Ceylon, by and with the advice and consent of the Legislative Council thereof, as follows :—

2.—(*b*) Every individual having a place of business in the Colony and carrying on business under a business name which does not consist of his true full names without any addition ; . . . . shall be registered in the manner directed by this Ordinance.

4.—(1.) Every firm or person required under this Ordinance to be registered shall furnish, by sending by post or delivering to the Registrar at the register office in that part of the Colony in which the principal place of business of the firm or person is situated, a statement in writing in the prescribed form containing the following particulars : (*a*) The business name. (*b*) The general nature of the business. (*c*) The principal place of business . . . . (*e*) Where the registration to be effected is that of an individual, the present name (in full), any former name (in full), the nationality, and if that nationality is not the nationality of origin, the nationality of origin, the usual residence, and the other business occupation (if any) of such individual.

7. Whenever a change is made or occurs in any of the particulars registered in respect of any firm or person, such firm or person shall, within fourteen days after such change, or such further period as the registrar may on application allow, furnish, by sending by post or delivery to the registrar in that part of the colony in which the aforesaid particulars are registered, a statement in writing in the prescribed form specifying the nature and date of the change, signed, and, where necessary, verified, in like manner as the statement required on registration.

8. If any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall, without reasonable excuse, make default in so doing . . . . every partner in the firm or the person so in default shall be liable, on summary conviction, to a fine not exceeding one hundred rupees for every day during which the default continues. . . . .

9. Where any firm or person by this Ordinance required to furnish a statement of particulars or of any change in particulars shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business, in respect of the carrying on of which particulars were required to be furnished, shall not be enforceable at any time while he is in default, by action or other legal proceedings either in the business name or otherwise.

12. On receiving any statement or affidavit made in pursuance of this Ordinance, the registrar shall cause the same to be filed, and he shall send by post or deliver a certificate of the registration thereof to the firm or person registering, and the certificate or a certified copy thereof shall be kept exhibited in a conspicuous position at the

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principal place of business of the firm or individual, and if not kept so exhibited, every partner in the firm, or the person, as the case may be, shall be guilty of an offence, and liable, on summary conviction, to a fine not exceeding three hundred rupees.

13. At each of the register offices hereinafter referred to the registrar shall keep an index of all the firms and persons registered at that office under this Ordinance, and at the principal register office a general index of all firms and persons so registered at every office throughout the Colony."

By s. 17 the Governor in Council has power to make rules or orders relating, among other matters, to the forms to be used under the Ordinance. Forms for the application by an individual for registration under the Ordinance and for statement of change under s. 7 (amongst others) were prescribed.

By the interpretation clause it is provided that " Business name " shall mean the name or style under which any business is carried on, whether in partnership or otherwise, and shall include a " vilasam." (1)

The material facts of the case are as follows : In 1924 the plaintiff began to carry on a business under the business name of " J. E. David & Co." : the nature of that business was that of accountants and auditors. That business was duly registered by the plaintiff under the provisions of the Ordinance on May 20, 1925. The material particulars of the registration are as follows :

| | |
|---|---|
| " 1. Business Name . . | J. E. David & Co. |
| 2. The General Nature of the Business . . | Accountants and auditors. |
| 3. The Principal Place of the Business . . | No. 2A Queen Street, Fort, Colombo. |
| 4. The Date of the Commencement of the Business, if the business was commenced | |

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(1) A group of initials ; a method of indicating a firm name frequently used in Ceylon and in Madras.

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|---|---|
| after Novr. 7 1918 . | March 10th, 1924. |
| 5. Any other Business Name or Names under which the business is carried on . . . | —— |
| 6. The present Name (in full) of the Individual | Jonathan Edward David. |
| 7. Any former Name (in full) of the Individual | —— |
| 8. The Nationality of the Individual . . . | British. |
| 9. The Nationality of Origin of the Individual if not the same as the present nationality . | —— |
| 10. The usual Residence of the Individual . . | Colombo. |
| 11. The other Business Occupation (if any) of the Individual . . . | —— ” |

It is to be noted that as the accountancy business was the only business carried on by the plaintiff at that time, there was no entry made opposite No. 11, “ The other business occupation (if any) of the individual.”

In the year 1926 the plaintiff started a timber business on his own account and carried on that business in his own name without any addition. The timber business was distinct from the accountancy business ; it was carried on in separate premises, and there was a separate set of books and bank account for the timber business.

In the course of carrying on the said timber business the plaintiff entered into the above mentioned contract with the defendant dated December 10, 1927. In the said contract the plaintiff was described as “ carrying on business under the name style and firm of J. E. David & Co.,” but it was signed by the plaintiff in his own name “ J. E. David.”

The plaintiff was described in the plaint in the suit as carrying on business under the name style and firm of J. E.

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David & Co. In spite of these matters both the Courts in Ceylon held after careful consideration of the evidence that the plaintiff did not carry on the timber business as "J. E. David & Co.," but that he carried it on under his own name "J. E. David." It is obvious that if he had carried on the timber business under the name of "J. E. David & Co.," he ought to have effected registration of the business name and other particulars required by s. 4.

Their Lordships, however, adopt the findings of fact of both the Courts in Ceylon in respect of this matter, and they are of opinion that as the timber business was carried on as a separate business and in his own name without any addition, it did not come within the purview of s. 2 (*b*), and it was not necessary for the plaintiff to register the timber business under that section.

It was contended on behalf of the plaintiff in the trial Court, and so held by the District Judge, that when the plaintiff started the timber business in 1926, it was not necessary for him to notify the registrar of that fact, inasmuch as it did not constitute "a change of the business specified in the register," and so was not within the purview of s. 7. The learned counsel for the plaintiff, in his argument before their Lordships, did not rely on this ground. On the contrary, he admitted and, in their Lordships' opinion, he rightly admitted that the starting of the timber business by the plaintiff did necessitate a change in the particulars which had been registered in respect of the accountancy business and that such change should have been notified to the registrar in accordance with the provisions of s. 7.

As already mentioned, the item 11—namely: "the other business occupation (if any) of the individual," in the registered particulars of the accountancy business, had been left without any entry against it, and when the timber business was started there clearly was a change in the particulars in that respect, of which a statement should have been furnished to the registrar in accordance with s. 7 of the Ordinance.

There remains for consideration the construction which the Supreme Court placed on the terms of s. 9.

The learned judges of the Supreme Court were of opinion that the words of that section—namely: "in respect of the carrying on of which particulars were required to be furnished," referred to all businesses conducted by the plaintiff whether in his own name or in the name of J. E. David & Co. The learned counsel who appeared for the defendant in effect adopted the Supreme Court's construction of the section, for he urged that once an individual had to register under the provisions of s. 2, he must register particulars of all his business activities, and if he failed so to do, the rights of such individual arising out of any contract in relation to any of such business activities could not be enforced by action or other legal proceedings while he was in default.

Their Lordships are of opinion that the aforesaid construction is too wide.

The words at the beginning of s. 9: "Where any . . . . person by this Ordinance required to furnish a statement of particulars," in this case must refer to the particulars in relation to the accountancy business, which it was necessary for the plaintiff to register, inasmuch as he was carrying on that business under a business name which did not consist of his own name, without any addition, and which were, in fact, registered by the plaintiff. Further, the change contemplated in the words "or of any change in particulars," must refer to the same particulars which had already been registered—namely: the particulars of the accountancy business. That being so, is there any reason for giving a larger or different meaning to the material words which follow later in the section: "the business, in respect of the carrying on of which particulars were required to be furnished"? Their Lordships think there is no such reason. They are of opinion that the natural construction to be placed on these words is that they refer to "THE" business in respect of which particulars had to be furnished or in respect of which any change in particulars had to be furnished—namely: the accountancy business.

The position may be summarized by saying that the business, in respect of which the disablement from suing mentioned in the ninth section arises, is the business which the plaintiff was

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carrying on under a business name, in respect of which he was required under the Ordinance to furnish a statement of particulars or any change in such particulars—namely: the accountancy business. In other words, there was no default in respect of the timber business; the default was in respect of the accountancy business, by reason of the plaintiff's failure to notify the change in the particulars of the accountancy business.

One of the learned judges in the Supreme Court was of the opinion that the words of s. 9 were not easy of interpretation, and said that he had arrived at his conclusion with some hesitation. Their Lordships agree with the learned judge that the meaning of the section might have been made more clear. They are of opinion, however, that if there is ambiguity as to the meaning of the section, inasmuch as it is a disabling section, the construction which is in favour of the freedom of the individual should be given effect to.

Their Lordships, therefore, are of opinion that although the plaintiff was in default by failing to notify the registrar of the change in the registered particulars of the accountancy business, that default did not deprive him of his right to sue the defendant for the breach of contract made by him with the plaintiff in relation to his timber business.

For these reasons the appeal should be allowed, the decree of the High Court, dated September 1, 1930, must be set aside, and the decree of the District Judge, dated September 20, 1929, restored. The defendant must pay to the plaintiff his costs of this appeal and of the appeal in the High Court. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Abbott, Hudson & Anderson.*
Solicitor for respondent: *O. A. Cayley.*

[PRIVY COUNCIL.]

## *In re* BENEFICES OF EDBURTON AND POYNINGS.

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APPEAL UNDER THE UNION OF BENEFICES MEASURE, 1923.

*Ecclesiastical Law—Union of Benefices—Report of Commission of Inquiry—Approval by Bishop—Approval subject to reservation—Chairman of Commission of Inquiry—Union of Benefices Measure,* 1923 [14 *&* 15 *Geo.* 5, *No.* 2], *s.* 3 (*d*); *s.* 4, *sub-s.* 1.

The report of a commission of inquiry constituted under the Union of Benefices Measure, 1923, recommended the union of two benefices, and stated that the united endowments were not too much. The bishop of the diocese endorsed on the report his approval, with the reservation that the income of the united benefices should be limited to 500*l.* net, and the surplus allocated to other benefices. The Ecclesiastical Commissioners prepared a scheme for union which provided that a substantial part of the endowments should be alienated:—

*Held*, that there had been no approval of the report by the bishop as required by s. 4, sub-s. 1, of the Measure, and that there was no jurisdiction to prepare the scheme.

The chairman of the commission of inquiry nominated by the Ecclesiastical Commissioners under s. 3 (*d*) of the Measure should not be in any way officially connected with the Commissioners, nor one so frequently nominated as chairman as to afford any ground for the suggestion that he is present to represent their views.

Scheme set aside.

APPEAL under the Union of Benefices Measure, 1923, referred to the Judicial Committee under s. 10, sub-s. 5, of the Measure.

The appeal was from a scheme, dated November 10, 1932, prepared by the respondents, the Ecclesiastical Commissioners, for the union of the benefices of Edburton and Poynings, in the diocese of Chichester.

The appellants were the rectors of the two parishes, and nominees of the Archbishop of Canterbury and the Lord Chancellor, the patrons of the respective benefices.

1933. Oct. 19, 20. *Rev. Hugh Barrington Sinclair* (Rector of Poynings), an appellant, in person.

*F. H. L. Errington* for the respondents.

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* *Present:* LORD ATKIN, LORD TOMLIN, and LORD THANKERTON.

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Their Lordships stated that they would advise His Majesty that the appeal should be allowed, and that the reasons would be delivered later.

Nov. 17. The judgment of their Lordships was delivered by

LORD TOMLIN. In this case their Lordships have already humbly reported to His Majesty in Council that the scheme should be dismissed and they will now state the reasons for their report.

These two benefices comprise two parishes adjoining the South Downs, about 10 miles north-west of Brighton. The net annual income of Edburton is 388*l.* per annum and that of Poynings is 430*l.* per annum. In the parish of Edburton there is, in addition to the parish church, a mission church at which services are held.

The present incumbent of Edburton is a high churchman, while the incumbent of Poynings is an evangelical. The churchwardens of Poynings stated at the inquiry that no change was desired in the character of the services at Poynings.

The Edburton parish church is an interesting early thirteenth century church, and many persons visit it in the course of the year and by their contributions provide a considerable income for the parish. The church stands apart from any dwelling except the rectory, and it is said that if the rectory ceased to be occupied as a rectory there would be difficulty in finding any one to look after the church. Poynings rectory is over two miles from Edburton church. There is some evidence that building developments are probable in the near future in the parish of Edburton.

The commission of inquiry was appointed to inquire into the question of the union or unions of any two or more of four benefices, namely, Pyecombe, Newtimber, Edburton and Poynings. The commissioners were seven in number, namely, a chairman nominated by the Ecclesiastical Commissioners, the Archdeacon of Lewes, nominated by the Bishop, a nominee of the patron and parochial church council of each of the four benefices, and the Rural Dean of the Deanery of

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Hurst nominated by the Diocesan Union of Benefices Committee.

The commissioners in their report recommended the union of the benefices of Pyecombe and Newtimber, and this union was in due course carried out. They also recommended (inter alia) (1.) the union of the benefices of Edburton and Poynings; (2.) that the rectory of Poynings should be the parsonage house of the united benefice; and (3.) that in the case of Edburton and Poynings the united endowments were not too much, as the parsonage house was a large one.

The bishop on receiving this report did not, so far as Edburton and Poynings were concerned, signify in writing his approval of it. On the contrary he endorsed upon it the following words: "Approved as to union: with reservation that the income of the united benefices in each case should be limited to 500*l.* net and the surplus allocated to other benefices in the diocese of Chichester (Sgd.) George Cicestr. 27.10.31."

Nevertheless the Ecclesiastical Commissioners prepared a scheme for the union of the benefices of Edburton and Poynings in which they gave effect to the recommendations of the report in regard to this parsonage house, but notwithstanding the recommendation as to the endowment contained in the report provided for the alienation of a substantial part of the endowments in favour of other benefices in the diocese.

In their Lordships' judgment there never was in this case any approval by the bishop of the report as required by s. 4, sub-s. 1, of the Measure, with the result that the Ecclesiastical Commissioners had no jurisdiction to cause a scheme to be prepared. This being so the scheme appealed against ought in their Lordships' opinion to be dismissed, but it is right to add that their Lordships are not satisfied that the present scheme upon its merits ought in any case to be affirmed.

Before parting with this case their Lordships desire to add a word upon a matter of some importance. In this case criticisms were made as to the way in which the inquiry was conducted, and there is no doubt that there was some misunderstanding on the part of some of the commissioners as to the nature of the proceedings and the effect of what was being recommended in the report.

Their Lordships are satisfied that there was no ground for complaint against any of the commissioners.

Their Lordships, however, desire to point out that in all these cases it is important that the inquiry should both be and appear to be impartial and that having regard to the composition of the commission as prescribed by the Measure the independence of the chairman selected by the Ecclesiastical Commissioners is of great importance and should be free from all possible question. For this reason in their Lordships' opinion it is undesirable that he should be connected in any way officially with the Ecclesiastical Commissioners, or be so frequently engaged in discharging the functions of chairman of such inquiries as to afford any ground for the suggestion that he is present to represent the views of the Ecclesiastical Commissioners.

Solicitors for respondents: *Milles, Jennings White & Foster.*

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J. C.*
1933
Nov. 17.

# *In re* BENEFICES OF THELNETHAM AND HINDERCLAY.

## APPEAL UNDER THE UNION OF BENEFICES MEASURE, 1923.

*Ecclesiastical Law—Union of Benefices—Disposal of Surplus Revenue—Charge in favour of other Benefices—Union of Benefices Measure*, 1923 [14 *&* 15 *Geo.* 5, *No.* 2], *ss.* 15, 16.

The power conferred by s. 15 of the Union of Benefices Measure, 1923, is a power to dispose of surplus revenue after competent provision has been made for the united benefices. The section therefore does not authorize the creation of a charge on the endowments in favour of other benefices, because upon a diminution of the endowments a competent provision might not remain. The power under s. 16 to create a rentcharge cannot be utilized to alter the character of the operation authorized by s. 15.

Scheme set aside.

Appeal under the Union of Benefices Measure, 1923, referred to the Judicial Committee under s. 10, sub-s. 5, of the Measure.

The appeal was from a scheme, dated May 26, 1932, prepared by the respondents, the Ecclesiastical Commissioners, for the union of the benefices of Thelnetham and Hinderclay, in the diocese of St. Edmundsbury and Ipswich.

The appellants were the patrons of the two benefices, also nominees of the respective parochial church councils.

1933. Oct. 19. *H. V. A. Raikes* for the appellants.

*F. H. L. Errington* for the respondents.

Nov. 17. The judgment of their Lordships was delivered by

Lord Tomlin. The two benefices in question comprise two adjoining parishes about 13 miles north of Stowmarket in a remote and thinly populated part of the county of Suffolk. The two churches are about 1½ miles apart.

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* *Present:* Lord Atkin, Lord Tomlin, and Lord Thankerton.

The net annual incomes of the two benefices (calculated according to the Pluralities Acts) are approximately as follows: Thelnetham, 535*l.*; Hinderclay, 389*l.*

There is an active church life in both parishes. Upon the evidence there is no reason to think that there would be, on a vacancy in either benefice, any difficulty in finding a suitable incumbent therefor.

The commission appointed to inquire into the matter under ss. 2 and 3 of the Union of Benefices Measure, 1923, consisted of four persons, namely, the Archdeacon of Sudbury nominated by the bishop, a nominee of the patron and parochial church council of each of the benefices, and a chairman nominated by the Ecclesiastical Commissioners.

The commission presented a report which was a majority report in the sense that the nominees of the patrons and parochial church councils voted against any union of benefices, while the chairman and the archdeacon were in favour of a union of benefices, and the recommendations of the report were carried by the casting vote of the chairman. These recommendations included (inter alia) recommendations (1.) for the union of the benefices, but not of the parishes; (2.) for the Thelnetham rectory to become the parsonage house of the united benefices and for the Hinderclay rectory to be sold; (3.) that the endowment of the incumbent of the united benefices should be not less than 750*l.* per annum and that the balance should be set aside to pay the stipend of a lay reader or deaconess and to defray the cost of clerical assistance at festivals.

The scheme prepared by the Ecclesiastical Commissioners differed from the recommendations of the report in that it affected to charge all the endowments other than glebe belonging to the united benefice with four several sums of 50*l.* each in favour of four other benefices in the same diocese, three of such charges to take effect from the date of union and one to take effect from the first avoidance of the united benefice.

The rector of Hinderclay and the patrons and the parishioners of both parishes appear to be unanimous in opposing the union. The rector of Thelnetham supports the union.

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BENEFICES OF THELNETHAM AND HINDERCLAY, *In re.*

Their Lordships are unable to see that in the circumstances of this case there is any benefit accruing to either parish from the proposed scheme. The only parishes which will benefit if the scheme is approved are those in whose favour parts of the endowments are to be alienated.

In their Lordships' opinion the principles indicated in the *Gussage All Saints and Gussage St. Michael* case (1), and in the *Great Massingham and Little Massingham* case (2), apply, and the scheme ought to be dismissed.

A point of importance however arises in the present case. The scheme purports to create a charge on the endowments in favour of other benefices, so that if there is any diminution in the future in the endowments the loss will be borne by the united benefice.

In their Lordships' judgment the scheme in this respect is not justified. The power conferred by s. 15 of the Measure is a power to dispose of surplus revenue after competent provision has been made for the united benefice. The effect of the scheme might be that hereafter in the event of a diminution of the endowments there would not remain competent provision for the united benefice after the rent-charges had been satisfied.

It is true that under s. 16 there is power to create a rent-charge, but that power cannot in their Lordships' judgment be utilized to alter the character of the operation which is permitted to be carried out under s. 15..

Their Lordships will humbly report to His Majesty in Council that this appeal should be allowed and that the scheme for the union of the two benefices be dismissed.

Solicitors for appellants: *Partridge & Wilson.*

Solicitors for respondents: *Milles, Jennings White & Foster.*

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(1) (1925) 69 Sol. J. 493.

(2) [1931] A. C. 328.

*Considered.* BONYTHON *v.* COMMONWEALTH OF AUSTRALIA [1951] A. C. 201

[HOUSE OF LORDS.]

H. L. (E.)
1933
*Dec.* 15.

ADELAIDE ELECTRIC SUPPLY COMPANY, LIMITED . . . . . . APPELLANTS;

AND

PRUDENTIAL ASSURANCE COMPANY, LIMITED . . . . . . . . . RESPONDENTS.

Distinguished. NAT. BANK OF AUSTRA-ASIA *v.* SCOTTISH UNION [1952] A.C. 493

*Company—Shares—Company registered in England—Business exclusively in Australia—English Stockholders—Dividends—Declaration in Australia—Payment—English or Australian Currency.*

The A. E. Company was an English company incorporated under the Companies Acts, 1869 to 1909, as a company limited by shares and having its registered office in London and a branch office in Adelaide, South Australia, where it carried on its business of supplying electric light. The capital of the Company included certain 5 per cent. A cumulative preference shares (A shares) and certain 6½ per cent. C cumulative preference shares (C shares). On June 1, 1925, and thenceforward the P. Company was and remained registered in England as the holder of A shares which had been issued in England in 1919. In 1924 and 1928 the same Company was registered as the holder of C shares which had been offered for subscription concurrently in England and Australia.

In 1921 by special resolutions duly passed and confirmed the whole conduct and control of the A. E. Company's business, except formalities required by statute to be observed in England, were transferred to Australia, and it was provided that all dividends should be declared at general meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia, and that all preference dividends declared by the board of directors should be declared at meetings to be held in Australasia and should be paid in and from Adelaide or elsewhere in Australasia, and that no part of the profits of the Company should be transmitted to the United Kingdom except in payment of dividend to members ordinarily resident there.

In 1929 the A and C shares were converted respectively into A stock and C stock.

On and since March 1, 1931, the A. E. Company paid dividends on its stock by delivering to the stockholders warrants payable at the Bank of Adelaide, South Australia.

The P. Company claimed a declaration that they and all other holders of A stock and C stock registered in the A. E. Company's register in England were entitled to be paid their dividends in sterling in England in English legal tender for the full nominal amount thereof and not subject to deduction for Australian exchange, and to an order for payment accordingly less the amount already received in respect of the dividends.

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

*Held*, reversing the orders of Farwell J. and the Court of Appeal, that inasmuch as the dividends were by agreement between the parties to be paid in Australia, the A. E. Company had discharged its obligation by paying in Australian currency that which was in Australia legal tender for the nominal amount of the dividend warrants.

*Broken Hill Proprietary, Co., Ld.* v. *Latham* [1933] Ch. 373 overruled.

APPEAL from an order of the Court of Appeal.

The appellant Company was incorporated on April 10, 1905, under the Companies Acts, 1862 to 1900, as a company limited by shares. Their registered office was and is situate in London. Their initial capital was 300,000*l.*, divided into 60,000 shares of 5*l.* each. Their capital at the date of the writ was 3,000,000*l.*, including 250,000 5 per cent. (free of British Income Tax) A cumulative preference stock and 1,000,000 6½ per cent. C cumulative preference stock.

11,000 A preference shares of 1*l.* were allotted to the predecessors of the respondents on July 30, 1919, in accordance with an application made in England in response to a prospectus issued in England only. These shares were transferred to the respondents in or about June, 1925, and they were registered as the holders of the shares on June 4, 1925, and continued to hold the same until they were converted into stock as hereinafter appears. The respondents were at the date of these proceedings holders of the substituted stock.

20,000 C preference shares of 1*l.* were allotted to the respondents on November 3, 1924, in accordance with an application made in England in response to a circular letter issued in England and South Australia by the appellants dated respectively on October 14 and October 6, 1924.

10,000 C preference shares of 1*l.* were allotted to the respondents on December 3, 1928, in accordance with an application made in England in response to a circular letter issued in England and South Australia by the appellants on November 13, 1928.

The shares in the appellant Company were duly converted into stock by resolutions passed by the Company on November 21, 1929, and by the directors on January 30, 1930.

Both the holdings of the respondents of 11,000*l.* A preference stock and 30,000*l.* C preference stock are registered in the appellant Company's register in England.

By a special resolution of the appellant Company passed on January 19, 1921, and confirmed on February 4, 1921, it was provided that all the business of the Company, except formal business required by statute to be transacted in England, should be transacted in Adelaide or elsewhere in Australasia as the Company should from time to time determine, and that all meetings of the Company and of the board of directors should be held in Adelaide or elsewhere in Australasia as aforesaid ; and it was further provided as follows :—

"All dividends that may be declared by the Company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and all preference and interim dividends declared by the Board shall be declared only at meetings of the Board held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and no part of the profits of the Company shall be transmitted to the United Kingdom except in payment of dividends of members ordinarily resident there."

The appellants ever since their incorporation have carried on business in the City of Adelaide, South Australia, and in the surrounding district, as suppliers of electric light and power. They have never carried on any business, other than their internal affairs, outside Australia. Since January 19, 1921, all their affairs, except such formal matters as are mentioned in the resolution of that date, have been conducted in Australia, and in particular all dividends have been declared in Australia. The Company has since 1906 kept a branch register in South Australia, and since the issue of the C preference shares there have always been considerable holdings of these shares or the stock substituted therefor registered on each of the registers.

Before March 1, 1931, all dividends paid to the holders of A preference stock or C preference stock registered in the appellant Company's register in England were paid by the Company by a cheque drawn on a bank in England, and all dividends paid to the holders of C preference stock registered in Adelaide were paid by cheque drawn on a bank in Adelaide, the cheques being made out for identical amounts in pounds, shillings and pence for identical holdings, subject where necessary to deduction of tax.

By a circular letter dated February 28, 1931, addressed and sent by the appellant Company to the holders of the A preference stock and the C preference stock on the London register, the Company informed the holders as follows :—

That warrants in respect of the present dividends on the preference stocks were being drawn on and made payable at the Adelaide office of the Bank of Adelaide, where they would be paid in full on presentation : alternatively, that arrangements had been made whereby stockholders might, if they wished, cash their warrants at the London Office of the Bank of Adelaide, but that those warrants would be subject to deduction of Australian exchange at the rate ruling on the date of presentation ; and that an amount equal to the exchange deducted would be deposited with the Company's bankers in London and placed by them to a separate account ; and that the Board would facilitate the hearing of any proceedings instituted for the purpose of deciding any question arising in respect of the deduction of exchange.

On and since March 1, 1931, the appellant Company has acted in accordance with the circular letter. They paid dividends to the stockholders, whether registered in England or in Australia, by delivering warrants for the nominal amount of the dividend (subject when necessary to deduction of tax) payable at the Bank of Adelaide in Adelaide. Arrangements were made whereby at the option of stockholders warrants could be cashed in London at the rate of exchange current at the date of encashment. The warrants for the dividends payable on the stock held by the respondents were by the respondents presented for payment at the Bank of Adelaide and were duly paid.

In consequence of the deduction for exchange in respect of dividends paid in London it was arranged that this action should be brought for the benefit of the general body of holders of A preference stock and C preference stock registered in the London register in order that their rights in regard to the payment of their dividends might be decided by the Court as suggested by the circular letter of February 28, 1931, and on February 15, 1932, the writ was issued.

The appellants (defendants to the writ) contended and the respondents denied that all sums due to the respondents in respect of dividends on the A preference stock and the C preference stock had been duly discharged. The respondents contended that they were entitled to be paid as dividend in respect of their A preference stock dividend at a rate which (after deducting British income tax at the rate for the time being current) should be equivalent to a dividend of 5*l.* per cent. per annum on that stock in sterling in England in English legal tender and as dividend in respect of their C preference stock dividend in sterling in England in English legal tender at the rate of 6*l.* 10*s.* per cent. per annum. The respondents therefore claimed to be paid the difference between the amount already received by them and the amount claimed by them on the aforesaid basis, and in future to be paid upon that basis.

The action was heard in the Chancery Division before Farwell J., who felt himself bound to follow the decision of the Court of Appeal in *Broken Hill Proprietary Co.* v. *Latham* (1), and gave judgment for the Prudential Assurance Co. The Adelaide Electric Supply Co. appealed, and the Court of Appeal (Lord Hanworth M.R. and Lawrence and Romer L.JJ.) followed the decision of the Court in the *Broken Hill Proprietary Co.'s* case (1) and dismissed the appeal.

The Adelaide Electric Supply Co. then appealed to this House.

1933. Nov. 2. *Wilfrid Greene K.C.* and *J. W. Brunyate* for the appellants. This case is the converse of *Broken Hill Proprietary, Ld.* v. *Latham.* (1) In that case an Australian company incorporated in the State of Victoria in the Commonwealth of Australia under a statute of the State of Victoria had issued debentures giving the holder the option of receiving payment at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide, or London. A debenture holder elected to be paid at the London office of the bank. The company took out a summons asking whether the debenture holder was entitled in respect of his interest coupons to the equivalent of what was legal tender in England for the nominal amount of the coupons. The exchange between the two countries at the time was 25 per cent. against Australia. In the present case the appellants are an English Company registered under the Companies Acts but carrying on all but formal business in Australia, declaring its dividends in Australia and paying them in and from Australia. In the *Broken Hill Proprietary* case (1) Maugham J. held that the debenture holder was entitled to have the equivalent of what would be legal tender in London for the nominal amount of his coupons. In the Court of Appeal (2) Lawrence and Romer L.JJ. (Lord Hanworth M.R. dissenting) reversed the judgment of Maugham J. and held that the Company had discharged their obligation by paying the equivalent in London of what was legal tender in Australia for the amount of the coupons. The present case is in substance an appeal from that decision of the majority of the Court of Appeal. It is submitted that the decision was wrong. It is based upon the assumption that there is, or was in January and February, 1931, an "Australian pound" differing in value from an English pound. This is a fallacy which consists in confusing a pound, which is a unit of account, with the coin of the same name but more properly called a sovereign, by which a debt of a pound is discharged. The pound is now and has always been the same in both countries. What is legal tender for a debt of a pound is another matter, which will be dealt with later.

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(1) [1933] Ch. 373.

But first it is submitted that at all material times and up to the passing of the Gold Standard (Amendment) Act, 1931, there was no difference in value between the English sovereign and the Australian sovereign. From the History of Currency in the British Colonies by Robert Chalmers (1893) it appears that the discovery of gold in Australia in 1851 led to a demand that Branches of the Royal Mint should be established in New South Wales and other Australian Colonies. By an Order in Council of August 19, 1853, it was ordered that a Branch of the Royal Mint should be established in Sydney, New South Wales, and that pieces of gold money should be coined at that Branch to be called Australian sovereigns and Australian half-sovereigns and to be of the same weight, fineness and values with the sovereigns and half-sovereigns current in the Realm and that the said pieces of money should be current and lawful money within all the Colonies in Australia, New Zealand and Van Diemen's Land. In May, 1855, the first Colonial Branch of the Royal Mint was opened in Sydney. About seventeen years later another branch was opened in Melbourne. During the first five years of its working the only coins issuing from the Sydney Branch were sovereigns and half-sovereigns, and they were legal tender only in Australia, New Zealand and Van Diemen's Land; but by the Sydney Branch Mint Act, 1863 (26 & 27 Vict. c. 74), power was conferred on Her Majesty to declare gold coins struck at the Sydney Branch Mint and being of the same weight and fineness as are required by law with respect to gold coins of the same denominations made at the Royal Mint in London, should be legal tender for payments within the United Kingdom. Under this Act a Royal Proclamation was issued on February 3, 1866, making the declaration authorized thereby. By a Royal Proclamation issued on January 14, 1871, it was declared that the pieces of money duly coined at the Sydney Branch in accordance with the standards of weight and fineness of the coins of the currency of the Realm (1) should be current and lawful money

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(1) [1933] Ch. 373.

(2) Ibid. 393.

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(1) These standards were prescribed by the Coinage Act, 1870 (33 Vict. c. 10), which provides, by s. 3, that "All coins made at the Mint of the denominations mentioned in the first schedule to this Act shall be of the weight and fineness specified in that schedule, and the standard trial plates shall be made accordingly.

If any coin of gold, silver, or bronze, but of any other denomination than that of the coins mentioned in the first schedule to this Act, is hereafter coined at the Mint, such in the United Kingdom. By the Colonial Branch Mint Act, 1866 (29 & 30 Vict. c. 65), power was conferred on Her Majesty with the advice of Her Privy Council to declare that gold coins made at a Colonial Branch Mint of the same weight and fineness as required by law with respect to gold coins of the same denominations made at the Royal Mint in London, should be legal tender for payments within any part of Her Majesty's dominions to be specified in the proclamation in which gold coins issued from the Royal Mint are legal tender, and it was provided that on the issue of the proclamation such gold coins should be legal tender accordingly. By an Order in Council and a Proclamation made on November 10, 1866, in pursuance of this Act it was ordained, declared and commanded that coins of the proper design, weight and fineness made at the

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coin shall be of a weight and fineness bearing the same proportion to the weight and fineness specified in that schedule as the denomination of such coin bears to the denominations mentioned in that schedule.

Provided that in the making of coins a remedy (or variation from the standard weight and fineness specified in the said first schedule) shall be allowed of an amount not exceeding the amount specified in that schedule."

By s. 6: "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

The weight and fineness specified in the first Schedule to the Act are for a sovereign 123·27447 grains Imperial weight and the fineness is eleven-twelfths fine gold, one-twelfth alloy; or millesimal fineness 916·66. At the foot of the Schedule is a statement that "The weight and fineness of the coins specified in this Schedule are according to what is provided by the Act 56 Geo. 3, c. 68, that the gold coin of the United Kingdom of Great Britain and Ireland should hold such weight and fineness as were prescribed in the then existing Mint indenture (that is to say), that there should be 934 sovereigns and one 10 shilling piece contained in 20 lbs. weight troy of standard gold, of the fineness at the trial of the same of 22 carats fine gold and 2 carats of alloy in the lb. weight troy; and further, as regards silver coin, that there should be 66 shillings in every lb. troy of standard silver of the fineness of 11 ounces 2 pennyweights of fine silver and 18 pennyweights of alloy in every lb. weight troy." [Numbers set out in words in the Act are here for convenience replaced by figures.]

Sydney Branch Mint should be legal tender in the parts of the Dominions specified in the Schedule. The Schedule contained all the Dominions except Victoria, Canada, and Newfoundland. In further pursuance of the Colonial Branch Mint Act, 1866, by a Royal Proclamation dated August 7, 1869, reciting that a Branch of the Royal Mint was to be established in Melbourne, Victoria, and that gold money was to be coined at that branch of the same designs, weight, fineness and value with the sovereigns and half-sovereigns current within the Realm, Her Majesty, with the advice of Her Privy Council, ordained, declared and commanded that coins made at the Melbourne Branch Mint of the approved designs and of the weight and fineness required with respect to gold coins of the same denomination made at the Royal Mint in London, should be legal tender in all parts of Her Dominions in which gold coins issued from the Royal Mint were at the date of the Proclamation legal tender.

By a Royal Proclamation dated January 14, 1871, it was, with the advice of the Privy Council, ordained, declared and commanded that all pieces of money coined at the Sydney Branch of the Royal Mint in accordance with the standards of weight and fineness of the various coins of the currency of the Realm and of the approved designs should be current and lawful money within the United Kingdom, and that after promulgation of the Proclamation by the Governors of the thereinafter mentioned Colonies and Possessions (including Canada and Newfoundland) all the said pieces of money should be current and lawful money in the said several Colonies and Possessions and should be legal tender in the United Kingdom and the said Colonies and Possessions at the like values and by the like names as the corresponding coins of the currency of the Realm and concurrently with any coins current in the United Kingdom and the Colonies and Possessions respectively.

This Proclamation omitted from the list of Colonies and Possessions the Colony of Victoria, but that Colony was added to the list by a Royal Proclamation of March 24, 1871.

As the result of these statutes, orders and proclamations, a gold sovereign, whether minted in England or in Australia, was, and still is, legal tender for 1*l*. in both countries. The Coinage Act, 1909, of Australia (No. 6 of 1909) empowered the Treasurer to issue silver and bronze coins, and provided that both these Australian coins and British coins should be legal tender. This Act also contained provisions similar to those contained in the Coinage Act, 1870. The Australian Act of 1909 did not empower the Treasurer to issue gold coins, but it specified the standard, weight and fineness of all coins, gold, silver and bronze, in conformity with the provisions of the Coinage Acts, 1870 and 1891 (54 & 55 Vict. c. 72).

By the Australian Notes Act, 1910 (No. 11 of 1910), power was given to the Governor-General to authorize the Treasurer to issue Australian notes, and it was provided by s. 6 of the Act that the notes so issued should be legal tender throughout the Commonwealth and should be payable in gold coin on demand at the Commonwealth Treasury. By the Commonwealth Bank Act, 1920 (No. 43 of 1920), s. 7, which now appears as s. 60 G and s. 60 H of the Commonwealth Bank Act, 1911 to 1932 (No. 16 of 1932), it was provided that the Commonwealth Bank might issue notes which were to be legal tender throughout the Commonwealth, and were to bear the promise of the Treasurer to redeem the notes in gold coin on demand at the Head Office of the Commonwealth Bank. By the Commonwealth Bank Act, 1929 (No. 31 of 1929), the Treasurer was empowered to authorize the Board of the Commonwealth Bank to require persons to exchange for its equivalent in Australian notes any gold coin or bullion held by them, the equivalent being in the case of gold coin the nominal value thereof. By the Commonwealth Bank Act, 1932 (No. 16 of 1932), the proviso in the Commonwealth Bank Act, 1920, that the bank notes should bear the promise of the Treasurer to redeem them in gold coin was repealed.

With regard to currency, coinage and legal tender in England, before 1914 legal tender consisted of coins issued in pursuance of the Coinage Act, 1870, of which coins only gold coins were legal tender for an unlimited amount, and Bank of England 5*l*. notes, which under the Bank of England Act, 1833 (3 & 4 Will. 4, c. 98), s. 6, were legal tender in England for amounts exceeding 5*l.*, except that they were not legal tender by the Bank itself. These notes were by the Act repayable on demand. By the Currency and Bank Notes Act, 1914 (4 & 5 Geo. 5, c. 14), the Treasury was empowered to issue 1*l.* and 10*s.* notes which should be legal tender for payment of any amount. The holders of these notes were entitled to payment in gold coin on presenting them at the Bank of England. By the Gold Standard Act, 1925 (15 & 16 Geo. 5, c. 29), the Bank of England was relieved of its obligation to pay its own notes in gold coin and of its obligation under the Currency and Bank Notes Act, 1914, to pay the Treasury notes issued under that Act in gold coin, but a duty was imposed upon the Bank to sell gold bullion in bars of approximately 400 ounces troy at the rate specified in the Act. By the Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 13), the Bank was empowered to issue 1*l.* and 10*s.* notes which are legal tender for any amount. Lastly, by the Gold Standard (Amendment) Act, 1931 (21 & 22 Geo. 5, c. 46), the obligation of the Bank under the Gold Standard Act, 1925, to sell gold bullion was suspended. The result of these enactments, both of the Imperial Legislature and the Commonwealth Legislature, is that an obligation to pay a sum in pounds was at the material date the same obligation in both countries.

Then comes the question of legal tender, for although the obligation to pay a sum of money may be the same in two countries, what constitutes legal tender in the two countries may be different. In the present case it requires more Australian currency to pay a debt of *xl.* in London than it does to pay the same debt in Australia. So the crucial question is, where were these coupons to be paid ? And the answer is, they were to be paid in Australia. Then " In the absence of countervailing considerations, the following presumptions as to the proper law of a countract have effect :— First presumption.—Prima facie the proper law of the contract is presumed to be the law of the country where the contract is made (lex loci contractus) ; this presumption applies with special force when the contract is to be performed wholly in the country where it is made, or may be performed anywhere, but it may apply to a contract partly or even wholly to be performed in another country. Second presumption.—When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place (lex loci solutionis)" : Dicey, Conflict of Laws, 5th ed., pp. 671, 672. It follows that the dividends in question are payable in Australian currency and the appellants are entitled to succeed.

Nov. 6. *Sir William Jowitt K.C.*, *W. P. Spens K.C.*, and *H. S. G. Buckmaster* for the respondents. The respondents are well content to adopt for their argument the judgment of Lawrence L.J. in the Court of Appeal. The pound is a unit of value. A unit of value must possess a value, just as a unit of length must possess a length. As length cannot be measured except by something which has length, so value cannot be measured except by something which has value. After the passing of the Australian Notes Act, 1910, the standard of value represented by a pound in England was different from that represented by a pound in Australia. In other words, the English pound and the Australian pound were and are different.

The respondents became shareholders in the appellant Company in 1924, 1925, and 1928 upon the terms of the Memorandum and Articles of Association of that Company, an English company incorporated and registered in England. The capital of the Company, originally consisting of shares, afterwards converted into stock, was English capital in respect of which the respondents were registered in the Company's register in England. The respondents were therefore holders of English capital of an English company. It follows that their dividends were payable in English pounds.

The special resolution of January 9, 1921, confirmed on February 4 of the same year, had no effect upon the rights of the respondents to have their dividends paid in English pounds. The payment was to be made in Australia, no doubt; but the only effect of that was that the respondents were entitled to a sum in Australian currency which would purchase the number of English pounds appearing on the face of their dividend warrants. Furthermore, any resolution which purported to alter the rights of one set of shareholders for the benefit of another would be void without the sanction of the Court: *Allen* v. *Gold Reefs of West Africa, Ld.* (1), per Lindley L.J.

[The following works were also cited: Hawtrey, R. G., Currency and Credit (Longmans, Green & Co.), 1st ed., 1919, p. 365; 3rd ed., 1930, pp. 442 et seq.; Keynes, J. M., A Treatise on Money (Macmillan), 1930, vol. i., p. 3; Feavearyear, A. E., The Pound Sterling; A History of English Money (Clarendon Press), 1931, pp. 1—10, and Appendix III, p. 348.]

Nov. 9. *Wilfrid Greene K.C.* replied.

The House took time for consideration.

Dec. 15. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion which is about to be given by my noble and learned friend Lord Wright, and agreeing as I do with much of his reasoning, subject to the qualification I am about to express, I do not propose to discuss at length the question before the House. I desire, however, to add a few words on the topic whether there are or were two different "pounds," the Australian and the English. We do not seem to get very far by describing the "pound" as an unit of account. Its essential use is to denote a measure of value expressed in a specific currency or currencies. I say currencies, for it seems to me that it may well happen that the recipient of an obligation expressed in pounds may be indifferent as to the currency denoted by "pound" in which the obligation is discharged and is prepared to accept the currency which is legal tender in the country where performance is made, and that the legal rights of the parties accord with that position. It is in that sense that the "pound" can be said to be the "same" in the two countries. I think myself that this was the position for years while both England and Australia were on the gold standard, during the time

(1) [1900] 1 Ch. 656, 671.

when the "pound" in either country expressed a value measured in gold sovereigns or in promises contained in notes by whatever institution issued which were as good as gold. Of course, notwithstanding that the pound was the same, the contract might expressly or impliedly state the place for performance. In such a case the pound denoted value expressed in the currency of that place. The question of construction would then be not which pound was intended but in what place the obligation to pay a common pound was to be enforced. I think, however, that where values in one currency or another show a substantial difference there is every reason for concluding that the recipient is not indifferent to the currency in which the obligation is performed, and that the pounds then become different, so that there will be an English and an Australian pound. I apprehend that at the present day when an Australian farmer sells so many bales of wool in Australia for so many pounds he will ask for and receive quite a different number of pounds in accordance with the place, Australia or England, in which the obligation is to be performed. No doubt ordinarily in such cases the place of payment is expressed, but if not it would seem improbable that the parties intended different values varying with the country of performance. Without expressing a final opinion, I incline to think that at the present day the English pound and the Australian pound are not the same. In the application of this view to the present case I should prefer to say that at the material times the pound English and Australian was the same, and that therefore when the articles validly provided for payment in Australia the law of legal tender in Australia governed performance. If however they were different I do not dissent from the construction that, as altered, the articles provided for payment in Australian pounds. I should add that I also agree with the criticism of the decision in *Broken Hill Proprietary Co.* v. *Latham* (1), which must be considered to be overruled.

I move your Lordships that the appeal be allowed and the action be dismissed with costs.

(1) [1933] Ch. 373.

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LORD WARRINGTON OF CLYFFE (read by LORD TOMLIN). My Lords, the appellants are a Company registered in England under the Companies Acts and the respondents are registered in the appellants' English Register as holders of preference stock in the appellant Company, carrying the right to fixed preferential dividends, some of the shares now represented by such stock having been issued before 1921 and others after that date. By a special resolution of the appellant Company, confirmed in 1921, all dividends are to be declared in Australasia and are to be paid in and from Australasia. The question between the parties is whether (as the appellants contend) such dividends may be satisfied by payment in Australia of Australian legal tender to the nominal amount of the dividends, or whether (as the respondents contend) preferential dividends payable to stockholders registered in the English Register can be satisfied only by payment in England of English legal tender to the nominal amount of the dividends, or by payment in Australia of an amount in Australian legal tender sufficient, at the rate of exchange ruling for the time being, to purchase that amount of English legal tender in England.

This question was decided by Farwell J. and by the Court of Appeal in favour of the respondents, both Courts being of opinion that they were bound by the judgment of the Court of Appeal (Lord Hanworth M.R. dissenting) reversing a decision of Maugham J. in *Broken Hill Proprietary Co.* v. *Latham.* (1)

The solution of the question depends upon the true construction and effect of the contract between the appellants and the several classes of shareholders, having regard to the monetary conditions prevailing in England and Australia respectively.

The relative obligations of the Company and its stockholders are of course derived from and depend upon the memorandum and articles of association and the resolutions under which the several denominations of shares (now converted into stock) were issued and taken up. In this case, the Company being an English company registered under the Companies Acts, the contract between the Company and its members is an English contract and the law of the contract is English.

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Until the confirmation of the special resolution of 1921 hereinafter mentioned the business of the Company was managed from England, and dividends were declared in England and payment thereof was made in England and in English currency. This was in strict accord with the lex loci solutionis at that time applicable.

The practical business of the Company—namely, that of supplying electrical energy in the City of Adelaide, was, however, conducted and its profits made in that place, and in 1921 it was determined, obviously with a view to escaping from liability to English income tax, to transfer the entire business to Adelaide, leaving only mere formal business connected with the English register and so forth to be conducted here. This transfer was effected by the special resolution confirmed in February, 1921, already referred to.

It is only necessary to refer to that part of the resolution relating to dividends, which runs as follows :—

" All dividends that may be declared by the Company in general meeting shall be declared only at a general meeting held in Adelaide or elsewhere in Australasia, and shall be paid in and from Adelaide or elsewhere in Australasia, and all preference and interim dividends declared by the Board shall be declared only at meetings of the Board held in Adelaide or elsewhere in Australasia, and shall be paid in and from Adelaide or elsewhere in Australasia, and no part of the profits of the Company shall be transferred to the United Kingdom except in payment of dividends to members ordinarily resident there."

It cannot on the admitted facts be successfully contended that this resolution was otherwise than an effective special resolution under the Companies Acts, and binding on the respondents, and, if this be so, it has the effect of modifying the original contract between the Company and its members, even those who became members before its date. The particular modification material in the present case was the

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change of the locus solutionis as regards dividends from England to Australia.

The general rule I think is well settled—namely, that in such cases monetary obligations are effectually discharged by payment of that which is legal tender in the locus solutionis and, unless there is something in this case to take it out of the general rule, the question ought, in my opinion, to be decided in favour of the contention of the appellant Company.

Is there then in this case any circumstance sufficient to take the case out of the general rule as above stated ? In the first place the fact that the A preference stock forming a portion of the respondents' holding was created prior to 1921 cannot in my opinion distinguish their position as regards this stock from their position as to the remainder of their holding. The special resolution of 1921 applies to the dividends on all preference stocks without distinction, and from that date all such dividends are to be declared and paid in Adelaide or elsewhere in Australasia. The place of payment is therefore Australasia.

The next question is what amount in Australian currency must be paid in order to satisfy an obligation to pay so many pounds, shillings and pence. After consideration of the history of Australian and English money I have come to the conclusion that, merely as a unit of account, the pound symbolized by the £ is one and the same in both countries, and that the difference in the currencies merely concerns the means whereby an obligation to pay so many of such units is to be discharged. The currency in both countries is now a paper currency not convertible into gold and it is legal tender in each country for any amount. There is a token currency in silver and bronze in each country which is legal tender as to silver for not more than 2*l.* and as to bronze for not more than one shilling. An obligation therefore to pay in Australia so many pounds, shillings and pence is in my opinion effectually discharged by payment there of that amount and no more in Australian currency.

It happens unfortunately for the present holders in England of the various preference stocks that the exchange between the two countries is considerably against Australia, though from September, 1922, to June, 1926, it was in her favour. But if I am right in the opinion I have expressed questions of exchange are irrelevant, inasmuch as the obligations in question are finally discharged by the payment in Australia: see *King Line Ld.* v. *Westralian Farmers Ld.* (1)

In my opinion this appeal should be allowed and the orders of Farwell J. and of the Court of Appeal should be reversed with costs here and below and judgment entered in the action for the defendants.

It follows that in my opinion the judgments of Maugham J. and of Lord Hanworth M.R. in *Broken Hill Proprietary Co.* v. *Latham* (2) were correct and that the judgment of the majority in the Court of Appeal should be treated as overruled.

Lord Tomlin. My Lords, the appellant Company is an English company incorporated on April 10, 1905, under the Companies Acts, 1862 to 1900, as a company limited by shares. Its registered office is, and always has been, in London. Since the year 1906 it has kept, in addition to the principal register of shareholders in London, a branch register in South Australia. The business of the appellant Company is, and always has been, carried on in the City and District of Adelaide, South Australia. Prior to the passing on January 19, 1921, of certain special resolutions, which will be referred to later, the headquarters administration of the appellant Company was seated in London, where all general meetings were held.

The capital of the appellant Company includes (1.) certain stock known as 5 per cent. (free of British income tax) A Cumulative Preference Stock and (2.) certain stock known as 6½ per cent. C Cumulative Preference Stock. I shall refer hereafter to these two classes of stock respectively as the A stock and the C stock. Both the A stock and the C stock were originally in the form of shares and were converted into stock by virtue of a resolution of the appellant Company passed on November 21, 1929, and a resolution of the Board of Directors passed on January 30, 1930.

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(1) (1932) 48 Times L. R. 598.

(2) [1933] Ch. 373.

The A stock had its origin in a resolution of the appellant Company of July 1, 1919, increasing the then existing capital by 250,000*l.*, divided into 250,000 shares of 1*l.* each. The resolution provided (inter alia) that the shares were to be entitled to a cumulative dividend at a rate which, after deducting British income tax at the rate for the time being current, should be equivalent to a dividend of 5 per cent. per annum on such shares and that such shares were to rank pari passu with certain existing 6 per cent. cumulative preference shares of the appellant Company. The shares created by or pursuant to the last mentioned resolution were all issued in England in July, 1919. 11,000 of them were allotted to predecessors in title of the respondents, who transferred them to the respondents in or about June, 1925. On June 1, 1925, the respondents became, and since have been, on the register in England of the appellant Company the registered holders of such shares or of the corresponding amount of stock into which such shares were subsequently converted.

The C stock came into existence in the circumstances which I will next state. By four resolutions of the appellant Company dated respectively August 14, 1922, October 1, 1924, November 10, 1926, and November 12, 1928, the capital of the appellant Company was increased by sums which in the aggregate amounted to 1,000,000*l.* divided into 1,000,000 shares of 1*l.* each. The shares created by or in pursuance of the second and fourth of these four resolutions were offered for public subscriptions in England and Australia concurrently (applicants in Australia paying for the nominal amounts allotted in corresponding sums in Australian currency). On November 3, 1924, 20,000 C shares of the 1924 issue were allotted to the respondents as the result of an application by them in England, and on December 3, 1928, 10,000 C shares of the 1928 issue were allotted to them as the result of a like application. Since each of such allotments the respondents have been the registered holders on the English Register of the appellant Company of the C shares thereby allotted, or of the corresponding amount of stock into which such shares were converted.

On January 19, 1921, and February 1, 1921, certain special resolutions of the appellant Company were duly passed and confirmed, having for their object the complete transfer to Adelaide or elsewhere in Australasia, as the appellant Company in general meeting should determine, of the transaction, control, management and conduct of the whole of the business of the appellant Company, except such formal parts of the business as were, by the statutes for the time being applicable to such Company, required to be transacted in England or at the registered office for the time being.

These resolutions provided (inter alia) that, except so far as otherwise required by statute, all general meetings of the appellant Company and all meetings of the Board of Directors and all class meetings of shareholders should be held in Adelaide or elsewhere in Australasia as aforesaid, and, further, that all dividends that might be declared by the appellant Company in general meeting should be declared only at a general meeting held in Adelaide or elsewhere in Australasia as aforesaid, and should be paid in and from Adelaide or elsewhere in Australasia as aforesaid, and that all preference and interim dividends declared by the Board should be declared only at meetings of the Board held in Adelaide or elsewhere in Australasia as aforesaid, and should be paid in and from Adelaide or elsewhere in Australasia as aforesaid, and that no part of the profits of the appellant Company should be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there. Since these resolutions were passed the affairs of the appellant Company have been managed and conducted wholly in Australasia and all dividends have been declared in Adelaide.

Before March 1, 1931, all dividends paid to the holders of A stock or C stock registered on the English Register were paid by the appellant Company by cheque drawn on a bank in England and all dividends paid to the holders of C stock registered on the Australian Register were paid by a cheque drawn on a bank in Adelaide, the cheques being made out for identical amounts in pounds, shillings and pence for identical holdings, subject, where necessary, to deduction of tax.

On or since March 1, 1931, the appellant Company has paid the dividends due upon its stock by delivery to the stockholders of warrants to the nominal amount of the respective dividends, subject where necessary to deduction of tax, payable at the Bank of Adelaide in Adelaide. The result, having regard to the present position of the exchange between this country and Australia, is that the respondents, who are resident in this country and are registered on the English Register, receive over here in money of English tender an amount which is less than the face value of the cheque which has been satisfied in Australia in money of Australian tender.

The respondents launched the present action in February, 1932, claiming in effect that they are entitled to be paid either in England in English legal tender the full nominal amount of the dividends or in Australia in Australian legal tender sufficient at the ruling rate of exchange at the due date to purchase in England the required amount of English legal tender. The appellant Company, on the other hand, contend that by the payments made in Australia all sums due to the respondents have been duly discharged. Farwell J. and the Court of Appeal, treating themselves as bound by the decision of the Court of Appeal in *Broken Hill Proprietary Co.* v. *Latham* (1), have decided in favour of the respondents.

The case both in the Courts below and before your Lordships' House led to an interesting discussion upon the past history and present position of the currency laws in the United Kingdom and Australia respectively with a view to illuminating the question whether or not there is an English pound distinct from the Australian pound or whether the pound is the unit or money of account common to both countries.

In a matter of this complexity a difference of opinion is not unlikely to occur, but I have reached the conclusion that Maugham J.—whose decision was reversed by a majority of the Court of Appeal—was right in the *Broken Hill Proprietary Co.* v. *Latham* (1) in holding that in October, 1920, the relevant date in that case, there was no Australian pound as a unit or

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money of account distinct from the English pound. In my opinion the position was the same in January and February, 1921, the relevant dates in the present case.

The pound sterling as the unit of measure was carried by the early settlers from this country to Australia. There has never in fact been either in the United Kingdom or Australia so far as I am aware any statute or Order in Council or other act in the law having the force of statute expressly separating the money of account of the United Kingdom from the money of account of Australia or creating a distinct Australian unit. The Commonwealth of Australia, created in 1900, was given full powers to make laws with respect to currency coinage and legal tender. It has in fact never affected expressly to alter the money of account or to set up a distinct Australian money of account. Both before and after the establishment of the Commonwealth the sovereign, whether minted in London or in any of the Australian mints, which were and are branches of the Royal Mint in London, was, as theoretically it is to-day, legal tender both in the United Kingdom and in Australia. The same is true of United Kingdom silver and bronze coins within the limits (common to both the United Kingdom and Australia) of the sums for which they are respectively legal tender, though the actual amount of United Kingdom silver and bronze coin current in Australia is negligible in amount.

The Australian Coinage Act of 1909 authorized the Treasurer of the Commonwealth to cause to be made and issued silver and bronze coins of specified denominations and specified weight and fineness, corresponding in fact with silver and bronze coins of the United Kingdom, and expressly provided that tender of payment of money if made in United Kingdom or Australian coins should be legal tender in the case of gold coins for the payment of any amount, and in the case of silver and bronze coins for the payment of 40 shillings and one shilling respectively. This Act reproduced as s. 7, s. 6, of the Coinage Act, 1870, of the United Kingdom.

This section is as follows : " Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

I confess that I find difficulty in assigning any meaning of precision to this obscure section. Whatever it means, however, it does not seem to contain anything inconsistent with the pound remaining the common money of account of the United Kingdom and Australia.

The power of making and issuing Australian gold coins possessed by the Commonwealth has never been exercised.

In 1910 power was conferred on the Treasurer of the Commonwealth to issue, and there were issued, Australian notes convertible into gold which were legal tender within the territories of the Commonwealth. In 1911 the Commonwealth Bank was established by the Commonwealth Bank Act, 1911, and by an amending Act of 1920 the Bank was empowered to issue, and issued, notes convertible into gold which were made legal tender in the territories of the Commonwealth. The notes of the Commonwealth are not, and never have been, legal tender in the United Kingdom.

So the matter stood in the year 1921, and in that year at any rate there was, in my judgment, a common money of account of the United Kingdom and the Commonwealth, notwithstanding that there were differences between the two countries so far as legal tender was concerned. The difference in exchange in 1921 was small, and between 1922 and 1924 was in favour of Australia.

Further, I am not able to convince myself that the course of events subsequent to 1921 has made any difference in the theoretical position that there is one common money of account. It is true that neither country is any longer on the gold standard and that in each country as part of the legal tender there is an inconvertible note issue, but how do those facts affect the matter? There are still in law, as there always have been, common elements in the two currencies. I ask myself, if there has been a change in the money of account, when did it take place and what caused it and I find no answer.

The importance of this question seems to me to be that the answer must necessarily affect the angle from which the question of the construction of the appellant Company's obligations in respect of the payment of dividends is to be approached.

Now I do not think it can be doubted that the obligations which govern the relations between the appellant Company and their stockholders in regard to the payment of dividends are obligations arising out of an English contract and are to be regarded and construed as governed prima facie by English law. In relation to such obligations, therefore, the word " pound " and the symbol for pound must, I think, be regarded as referring, in the light of what I have said, to the money of account which on my view is common to the United Kingdom and Australia, and any payment to be made, expressed in that money of account, must be treated in the absence of any special provision as a payment to be made in England in that which is legal tender in England.

The question is, what was the effect in 1921 of introducing into the obligation of the appellant Company, having the effect I have indicated, a modification providing for payment only in Australia. The provision as to the payment of dividend in and from Adelaide was, so far as A stock was concerned, introduced as a new condition after the issue of such stock, but so far as the C stock is concerned preceded, and therefore formed part of the terms of issue.

Now where in an English contract governed prima facie by English law there is a provision for performance in part in another country the prima facie presumption is that performance is to be in accordance with the local law, and I see no reason why this presumption does not apply in the present case. That must mean, applied to the facts of this case and upon the view I have expressed as to the pound,

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that the obligation to pay is an obligation to pay a sum of money expressed in a money of account common to the United Kingdom and Australia, and that when the payment under the terms of the obligation has to be discharged in Australia it has to be made in what is legal tender in Australia for the sum expressed in that common money of account. It cannot mean that it is an obligation to pay a sum of money expressed in money of account which is not Australian money of account and that therefore if payable in Australia it must be discharged there by payment either in English legal tender of the amount expressed in the English money of account or in Australian legal tender of such an amount expressed in the money of account of Australia as will buy in London the amount in English legal tender of the obligation expressed in the English money of account. So far as the decision of the majority of the Court of Appeal in *Broken Hill Proprietary Co.* v. *Latham* (1) differs in principle from the foregoing I think it was wrong, and that apart from a special question in relation to the A stock which I will next consider the appeal in the present case ought to succeed.

It is, however, urged by the respondents that the resolutions of 1921 if, and so far as they operate to the detriment of holders of A stock, were invalid because they were not consented to by a class meeting of such holders. This contention is based upon art. 74 of the articles of association of the appellant Company, which is in the following terms:—

"74. The holders of any class of shares may, by an extraordinary resolution passed at a meeting of such holders, give on behalf of all the holders *of shares of the class* any consent required to the issue or creation of any shares ranking equally therewith, or having any priority thereto, or may consent to the abandonment of any preference or priority, or of any accrued dividend, or to the reduction for any time or permanently of the dividends payable thereon, or to any scheme for the reduction of the Company's capital affecting the class of shares, and such resolution shall be binding upon all the holders of shares of the class: Provided that this article shall not be read as implying the necessity for such consent in any case in which, but for this article, the object of the resolution could have been effected without it."

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I do not think this contention is well founded. The object of the resolution, namely, the changing of the place of payment of dividends, was one which in my opinion could be effected without any consent by or on behalf of the A stockholders. The fact that, by reason of the operation of exchange rates, there is some loss to such stockholders arising out of the change in the place of payment of dividends is not, I think, a reduction in dividend within the meaning of the article or an interference with any preference or priority of such stockholders.

In the result, therefore, I think that the appeal should be allowed and that the judgment of Farwell J. and the order of the Court of Appeal be set aside and that the action should be dismissed and the costs here and below be paid by the respondents.

LORD RUSSELL OF KILLOWEN. My Lords, in common with all those before whom this case has come for decision, I have found it to be one of great difficulty.

I will not repeat the facts which have given rise to the question before this House. The Courts below answered it in favour of the respondents, conceiving themselves bound by the earlier decision of the Court of Appeal in the *Broken Hill* case. (1) The present is, in a sense, the converse of that case; but, as Farwell J. pointed out, the Court of Appeal had held in the *Broken Hill* case (1) that the English pound and the Australian pound were separate monetary units, and that, considering the matter upon that basis, he could find nothing in the relevant resolution affecting the primary obligation of the Company to pay its dividends, at any rate to its English stockholders, in English currency.

The crucial point, and the foundation of the difference between Maugham J. and the majority of the Court of Appeal

(1) [1933] Ch. 373.

Lord Russell of Killowen.

in the *Broken Hill* case (1), is the answer to the question whether there existed something (which is variously called a measure of value, a standard unit of value, money of account, and a unit of account) which could be called an Australian pound as distinct from an English pound. Maugham J. thought not. Lawrence and Romer L.JJ. held that such an Australian pound did exist.

In the opinion of my noble and learned friend Lord Tomlin which has just been delivered is contained a short but sufficient statement of how matters stood in Australia in the year 1921 in regard to the pound as a unit of account, and in regard to legal tender for discharging debts incurred in terms thereof. I need not repeat it: but it satisfies me that the pound in Australia was originally the same unit of account as the pound in England, not merely a unit of account with the same name, and that it is impossible to say that any other or different unit of account has ever taken its place.

If this be the correct view this problem would resolve itself into a case of the Company becoming indebted from time to time in amounts payable in Australia, and expressed in terms of units of account common to Australia and England. The question then is, how can the Company discharge that indebtedness? The answer can I think only be, in whatever currency is legal tender in the place in which the indebtedness is dischargeable. It is not a question what amount of coins or other currency has the debtor contracted to pay. A debt is not incurred in terms of currency, but in terms of units of account. It is a question of discharging a debt incurred in terms of units of account common to more than one country, in the currency which is legal tender in the particular country in which the debt has to be paid.

I am of opinion that the judgment of Maugham J. upon this point in the *Broken Hill* case (1) was correct.

Upon the question arising under art. 74 of the Company's articles of association I have nothing to add to what has already been said. I would allow this appeal.

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LORD WRIGHT. My Lords, the action which gives rise to this appeal was brought by the respondents on behalf of themselves and all other holders of 5 per cent. A Cumulative Preference Stock and 6½ per cent. C Cumulative Stock of the appellant Company registered in the appellant Company's register in England. The question at issue was whether the dividends on these stocks (the shares of the appellants having been converted into stock) were payable in English sterling or Australian currency. The Court of Appeal affirmed the order made by Farwell J. that such dividends were payable either in England by paying English legal tender to the full nominal amount without deduction in respect of Australian exchange, or in Australia by paying such an amount in Australian legal tender as would at the rate of exchange ruling between England and Australia at the date of payment be equivalent to English legal tender in England to the full nominal amount of the dividends, subject to any proper tax deduction. The appellant Company contends that the order is wrong in law and that since and in virtue of a special resolution of the appellant Company duly passed on January 19, 1921, altering the Company's articles, the dividends are due and payable in Australia in Australian legal tender, subject, where proper, to any deduction on account of tax. The determination of the question depends on the true construction of the special resolution, in all the circumstances of the case.

The appellant Company was incorporated in 1905 under the Companies Acts, 1862–1900, as a company limited by shares, and its registered office is situate in London. Its business has, however, throughout been carried on in South Australia, in Adelaide, the business being that of supplying electric light and power. Since 1906 it has kept a branch register in Adelaide. The object of the special resolution was, by transferring all the management and control of the Company's affairs and its seat and head to South Australia, to secure that the appellant Company was no longer resident in England and was therefore no longer liable to English income tax in accordance with the decision of this House in *Mitchell* v.

*Egyptian Hotels, Ld.* (1) It is not questioned that this object was successfully achieved by the resolution. The material part of the resolution for purposes of this appeal was as follows:—

"All dividends that may be declared by the Company in General Meeting shall be declared only at a General Meeting held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and all preference and interim dividends declared by the Board shall be declared only at meetings of the Board held in Adelaide or elsewhere in Australasia and shall be paid in and from Adelaide or elsewhere in Australasia and no part of the profits of the Company shall be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there."

At the date of the special resolution the issued capital of the appellants consisted of 100,000 ordinary shares of 5*l.* and 250,000 A cumulative preference shares of 1*l.* each entitled to a dividend at a rate which after deducting British income tax should be equivalent to a dividend of 5 per cent. per annum. There were also debentures which are irrelevant for purposes of these proceedings. All the holders of the A cumulative preference shares were entered in the London register, though there is nothing to show (except in the case of the respondents) where they were resident. The respondents acquired in 1925 11,000*l.* A preference shares, and in 1924 and 1928 were allotted in all 30,000 of the 6½ per cent. C preference shares eventually issued by the appellant Company. By 1931 the capital of the appellant Company had been increased under various resolutions to a total of 3,000,000*l.*, which in 1930 had been converted into stock.

As the appellant Company was registered in England, it is clear that its capital must be a fixed sum in British sterling, and hence that in a winding-up the stockholders' shares of the assets on a distribution must be ascertained in British sterling. Similarly, all the returns and accounts required by the Companies Acts must have been rendered and kept according

(1) [1915] A. C. 1022.

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to the same currency. Before the special resolution, dividends were paid to shareholders in the London register by cheque drawn on a bank in England. The appellant Company, however, contends that the payment of dividends involves different considerations from those applicable to capital, and that as from the time when all dividends were, under the special resolution, to be declared in Adelaide or elsewhere in Australasia and to be paid in and from Adelaide or elsewhere in Australasia, they were to be paid according to the law of the place of performance, that is in whatever was legal tender in Australia.

It is established that prima facie, whatever is the proper law of a contract regarded as a whole, the law of the place of performance should be applied in respect of any particular obligation which is performable in a particular country other than the country of the proper law of the contract. To refer only to one authority, it was held in *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (1) that freight which under an English charterparty was payable at Barcelona was payable only to the extent of a proportion, being all that was permissible under the Spanish law, the law of the place of performance, since that law had forbidden payment of more than a maximum rate of freight, substantially less than the charterparty rate. Lord Warrington (2) quoted with approval from Dicey on Conflict of Laws, 2nd ed., at p. 553 (3): "When the contract is made in one country, and is to be performed either wholly or partly in another, then the proper law of the contract, especially as to the mode of performance, may be presumed to be the law of the country where the performance is to take place." "This last statement" (Lord Warrington adds) "is, in substance, identical with a passage in the judgment of Lord Esher in *Chatenay* v. *Brazilian Submarine Telegraph Co.*" (4) I need not multiply authorities on this point. But an essential element in the foreign law of the place of performance, when the performance is the payment of money, is the law of currency or legal tender governing in that place. An old authority

(1) [1920] 2 K. B. 287.
(2) Ibid. 295.
(3) 5th ed. (1932) p. 672.
(4) [1891] 1 Q. B. 79, 83.

may be cited: in the *Case de Mixt Moneys* (1), decided in the second year of James the First, in the Privy Council in Ireland, the facts were that where one Gilbert in London had taken from one Brett, merchant of Drogheda, a bond for 200*l.* on condition that the latter should pay to the former 100*l.* in Dublin; the question arose whether a tender of 100*l.*, which Brett had made in Dublin at the due date, was sufficient; at the time the bond was executed the currency in Ireland had been the same as that in England, but before the date for the tender certain "mixed moneys" of inferior purity had been proclaimed to be "loyall and currant money of the realm of Ireland." Brett made his tender in that currency; this tender was held to be sufficient. The Report goes on to say (2) that "en touts contracts de marchants, Consuetudo et statuta loci in quem est destinata solutio, respicienda sunt: Budelius de re Nummaria libr. 2, cap. 21." Thus the rule was recognized in the Law Merchant in reference to currency law. The word "pound" or the symbol "£" was the unit of account common to both countries, but in the absence of express words it was held to signify in Ireland a different currency, or measure of value, from that expressed by it in England. Where, however, the unit of account is different in the two countries a stipulation to pay a sum of sterling must be construed with reference to the country where payment is to be made; thus in *Ralli's* case (3) (supra) the freight in question was expressed to be payable at Barcelona "in cash or approved bills at charterers' option." Lord Sterndale (4) construed "in cash" as meaning "in Spanish currency." But the Irish case I have just cited shows that, where the same denomination is used in the two countries, the result may be that the sum in figures is to be construed as meaning that number of the common unit of account, "pounds" according to its meaning in the currency law of the country where payment is to be made. Thus it will be a question of construction in the absence of express terms whether the word "pound" means what may compendiously be described as an English pound or a Colonial pound. In

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(1) (1604) Davis's Rep. (Ireland) 18.
(2) Ibid. 28.
(3) [1920] 2 K. B. 287.
(4) Ibid. 291.

*Saunders* v. *Drake* (1) a question arose under the will of a testator who had lived in Jamaica in respect of a legacy under the will of 300*l.*; the legatee claimed that, as he was living in England and as the testator had property both in Jamaica and England, the legacy was payable in sterling and not according to the Jamaican " pound," which was of less value. Lord Hardwicke held that the legacy was payable according to the current money of Jamaica; he said that, as a general rule, if a sum of money is left by will in Dublin or Jamaica it must be paid in current money; he also held, apart from the general rule, that Jamaican pounds must be meant because other legacies in the same will were expressly left in sterling. Reference to the different values of English sterling and colonial currencies, having the same denomination of the pound, are not uncommon in the reports, as, for instance, in *Scott* v. *Bevan.* (2)

The respondents have, however, contended that in the present case the true construction of the special resolution is that the appellant Company are bound to pay to all shareholders, whether they are resident in England or Australia (or I presume elsewhere), not the agreed number of pounds in Australian currency, but such an amount of Australian currency as would equal at the appropriate date the agreed number of pounds in English currency, applying the same principles as in the case of the Spanish pesetas (3) and treating as immaterial the fact that " pound " is identically used as the unit of account both in England and Australia. On the other hand, the appellants have contended that the word " pound " means the same in both places, though local monetary conditions have given a different value in the different places. I need not pursue in detail the elaborate discussion, historical and economic, which there has been on this point before your Lordships in this case, but I can state shortly the conclusion at which I have arrived on the matter. For simplicity I disregard silver and bronze coins. Up to 1914 the currency of both England and Australia was based on, and stabilized by, the same gold coin, the sovereign, as established by the Imperial Coinage Act, 1870; sovereigns (and other gold coins) were minted only at the Royal Mint or its branches in Australia; these gold coins were legal tender in either country. Each country had however its own note issue, the English notes being issued by the Bank of England under the Bank Charter Act, 1833, and the Australian notes, at first, by the Treasurer under the Australian Notes Act, 1910, and later by the Commonwealth Bank under the Commonwealth Bank Act of 1920; but as both these classes of notes were by law convertible into gold according to the same gold coinage there can have been little, if any, reason to distinguish one currency from the other. In each currency the unit of account, the pound, was the same; and in each currency the measure of value expressed by that unit of account was the same—namely, the gold sovereign. In 1921, the date of the special resolution, the legal position had not changed, save that in England during the course of the War and by an Act of 1920 the export of gold had been prohibited: in 1914 also the issue of Treasury notes of 10*s*. and 1*l*. had been established. In fact gold had by 1921 practically gone out of circulation both in England and Australia, but in law in either country the notes were still convertible into gold as before. Later, in 1925, by the Gold Standard Act, the Bank of England was relieved of its obligation to pay its own notes and the Treasury notes in gold, though it was bound to sell bullion in bars of about 400 ounces at a fixed rate. In Australia, by the Commonwealth Bank Act, 1929, a person might be required by the Treasurer to surrender for the nominal equivalent in Australian notes any gold coin in his possession, and similarly any gold bullion; this in effect ended the convertibility of the Commonwealth notes; finally in England by the Gold Standard (Amendment) Act, 1931, the obligation of the Bank of England to sell gold bullion at a fixed rate was suspended, and by the Commonwealth Bank Act, 1932, the promise of the Treasurer to redeem the bank's notes in gold was repealed. Thus each country went off the gold standard, and the value of the pound, whether English sterling or Australian currency, was left to depend on the credit of the respective Governments and Banks of issue. Exchange rates are quoted between England and Australia; your Lordships have been provided with a summary of these at various dates from 1913 to 1932; if I take as illustrations the exchange in December, 1921, about the date of the special resolution, it was 1*l.* 10s. per cent. in favour of English sterling; in September, 1924, about the time of the allotment of C Preference shares to the respondents, it was 3*l.* per cent. in favour of Australian currency; it was still in favour of Australian currency in 1925 when the respondents acquired by purchase the A preference shares; in March, 1928, about the date at which the respondents were allotted their remaining C preference shares it was 15*s.* per cent. in favour of English sterling; in January, 1931, it was 30*l.* 5*s.* per cent. in favour of English sterling, and in March, 1932, it was 25*l.* 5*s.* per cent. in favour of English sterling. I think it must be held in view of these facts that not only in a business sense, but in a legal sense, the currencies of England and Australia are and were at all material times different currencies, notwithstanding the identity of the unit of account. This difference is inherent in the difference of the law-making authority at either place, as well as in the different commercial conditions prevailing. In the *King Line, Ld.* v. *Westralian Farmers, Ld.* (1), the parties had expressly provided in a charterparty between them, dated September 5, 1930, as between British sterling and Australian currency on the basis of their being different currencies, for the various payments according to the proper places at which they were to be made.

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(1) (1742) 2 Atk. 465.

(2) (1831) 2 B. & Ad. 78.

(3) [1920] 2 K. B. 287.

There thus falls to be decided in the present case which currency is intended on the true construction of the special resolution which altered the place at which dividends are declared and payable. Where the denominations of the currency are different, as in the case of the Spanish pesetas (2), it is clear that an exchange operation is necessarily involved. But where the denomination of the unit of account is identical in the two currencies, though the measure of value which is expressed by the unit of account is different, the question is not so concluded. If in the present case the articles as altered are treated as constituting pro tanto the contract between the shareholders and the appellant Company, the question is whether the proper law of the contract (which is English because the appellant Company is an English company) or the law of the place of the declaration and the payment of dividends, which is Australian, is to govern the meaning of the word "pound." In my opinion the latter is the true construction. The old cases I have cited show, as I think, that in determining what currency is intended, the general rule prima facie applies that the law of the place of performance is to govern. As Lord Eldon said in *Cash* v. *Kennion* (1), the debtor is bound to have the money ready at the appointed time and place of payment. It is natural and reasonable that the money he should be bound to have ready should be the legal money of that place, rather than that he should have a foreign currency or should have an amount in his home currency which is not the agreed figure, but a different figure representing an exchange operation by which the agreed figure is converted (in this case) from sterling to currency. Similarly, if a Frenchman and a Belgian were to agree that francs were to be paid by one to the other in Brussels, it would naturally be inferred in the absence of express terms that the Belgian franc was intended. The appellant Company furthermore was earning its profits in Australia, and except formal matters (such as the necessary returns and accounts under the English Companies Acts) all its affairs, including the declaration of dividends, were being conducted in Australia. It is not in evidence what proportion of the shareholders (now stockholders) are resident in Australia, but it is clear that a considerable number are so resident. If an Australian shareholder went with his preference dividend warrant to the appellant Company's bank in Adelaide, and asked for payment in notes, he would, it seems, expect to be paid in the legal tender there current, that is, in Commonwealth bank notes, and equally the same would be true of an English shareholder who happened to be in Adelaide, and asked for payment there. But the fact that a shareholder

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(1) 48 Times L. R. 598; 43 Ll. L. R. 378. (2) [1920] 2 K. B. 287.

(1) (1805) 11 Ves. 314, 316.

is in London and has the dividend warrant transmitted to him by post cannot affect his legal rights; the payment is still a payment in Australia, which is all that he is entitled to. In truth, at the date of the resolution in September, 1921, the question of exchange would not naturally assume the importance that it did in 1931, when the dispute arose. Neither the shareholders nor the appellant Company would, it seems, have in mind anything more than the payment of so many pounds in Australia, and it may fairly be inferred that they left the matter to be decided by the general rules of law applicable to the payment of so many pounds in Australia and took their chance how the exchange went; these rules, I think, involved the payment in Australia of the dividends declared in Australia in Australian currency. Questions of exchange would not naturally enter into consideration at all. The exchange might from time to time go, as in fact it did, in favour of one or the other currency.

I shall deal with some minor objections. First of all the fact that shareholders on the English register were between the date of the special resolution and the beginning of the dispute in 1931 paid in sterling at the agreed percentage cannot affect the construction of the resolution, which was, as I think, unambiguous. The directors could not vary the terms of that resolution or change its legal effect by any such course of conduct. Up to a late date, however, the actual exchanges were, on balance, very little in favour of sterling.

It is further objected that what is involved is that in the appellant Company's articles the "pound" in regard to dividends has a different meaning from the meaning of the "pound" on a distribution of capital; that result, however, follows because the place of performance, that is of payment, is different in the case of a dividend from the place of payment in the case of the distribution of assets in a winding-up. It is well recognized that in the same contract different laws may apply to the performance of the different obligations consequent on differences in the respective places of performance. Such a case was illustrated by the decision of this House in the case of the *King Line, Ld.* v. *Westralian Farmers, Ld.* (1), where various payments were to be made, some in England and some in Australia, and the several places of performance determined what currency was to apply. In the same case this House also recognized that a sum arrived at as a percentage on a sterling sum might properly be held to be payable in Australian currency because it was payable in Australia. This meets the objection taken by the respondents that the dividend is expressed in the allotment and certificates as 5 per cent. or 6½ per cent. on 100*l.* of capital ; presumably, however, each dividend, which is only an enforceable debt when it is declared, is declared and expressed in the relative warrant as so many pounds.

A further objection has, however, been pressed on behalf of the respondents, though it was not taken before Farwell J., or the Court of Appeal ; it is objected that so to accept the appellant Company's construction would involve, particularly in the case of the A preference shareholders, whenever the exchange went against Australia, an oppression on the preference shareholders on the London register, and indeed on the whole body of such shareholders, because they would be compelled to accept payment, at least in present conditions, in a currency depreciated as compared with sterling, though it would need to be conceded that the converse is true whenever the exchange went the other way. I do not think there is any force in that objection. It is not contested that the new article embodied in the special resolution of January 19, 1921, was in the interests of the Company as a whole. There is no record of any objection being taken by any one to the change, which would save the appellant Company as a whole from double taxation. The only proviso in the Articles which required the special consent of any class of shareholders had reference to a case where it was proposed to issue new shares with any preference or priority over then existing preference shares ; that proviso does not apply to the resolution in question, and article 74 provides that apart from such a case no consent of any class of shareholders should be required where the object of a resolution could be effected without that consent. In my judgment the special resolution changing the article was not only in form validly carried, as is admitted, but was in all respects effective. Nor can I attach any weight to the further objection that, if the resolution be construed as I think it ought to be construed, it was invalid as not giving a sufficiently clear notice to the preference shareholders that the amount of their dividends might be prejudicially affected by an adverse course of the Australian exchange, and hence must be construed as involving no change in the currency in which payment was to be made. In my opinion the special resolution is clear and unambiguous in providing that the place of payment should be Adelaide; what constitutes in law payment in Adelaide must follow by the application of general rules of law. But in any case I think this whole objection is unsubstantial. Indeed, as I have already indicated, in my opinion no one could have anticipated in 1921 that in 1931 the Australian currency would fall as far as it did below sterling. And if shareholders took the risk of loss through the Australian exchange being adverse, they would be entitled to reap the benefit in the converse case.

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(1) 48 Times L. R. 598.

For the reasons which I have explained the appellant Company were right in law and on the construction of the Articles as validly altered by the special resolution of 1921 in claiming, as they eventually did, that dividends declared after that resolution in Australia were payable to shareholders or stockholders in Australian legal tender in Australia and that it made no difference whether particular shareholders were registered on the London or the Colonial register. The Court of Appeal gave no separate judgment in this case, treating (as did Farwell J.) the matter as concluded by the decision of the Court of Appeal in *Broken Hill Proprietary Co.* v. *Latham.* (1) In that case the plaintiff company were registered in and carried on business in Australia but had also a registered office in London; they had issued debentures, a register of debenture holders being also established in London, and the moneys secured, both capital and interest, were

(1) [1933] Ch. 373.

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payable at the holder's option either in Australia or London. It was held by Maugham J. that debenture holders who had exercised the option to be paid in London were entitled to payment in sterling, because the exercise of the option made the moneys due and payable in London, whereas those holders who had elected to be paid in Australia were entitled to be paid in Australian currency. In the Court of Appeal that decision was reversed, Lord Hanworth M.R. dissenting and agreeing with Maugham J. In my judgment the decision of the majority of the Court of Appeal was erroneous in law ; I agree with the conclusion of Maugham J. and Lord Hanworth M.R. ; I think the law was correctly stated by Maugham J. where he says (1) : "A contract to pay so many pounds, whether a British or Australian contract, was not in 1920, and still less is now, a contract to pay in gold, but is prima facie a contract to pay money according to the currency of the country where payment has to be made." He and Lord Hanworth M.R. treated the case as one in which a sum of pounds payable in England was in all the facts of the case payable in English legal tender. The principle is in accordance with that which I think is to be applied in the case now before your Lordships, where a sum expressed in pounds, being payable in Australia, is payable in my opinion, for the reasons I have expressed, in Australian legal tender.

In the result I think this appeal should be allowed.

*Order appealed from reversed and action dismissed. The respondents to pay the costs in the Courts below and also the costs of the appeal to this House. Cause remitted to the Chancery Division to do therein as shall be just and consistent with this judgment.*

*Lords' Journals*, Dec. 15, 1933.

Solicitors for appellants : *Sydney Morse & Co.*
Solicitor for respondents : *Herbert H. Moseley.*

(1) [1933] Ch. 391.

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FEIST . . . . . . . . . APPELLANT;

AND

SOCIÉTÉ INTERCOMMUNALE BELGE D'ÉLECTRICITÉ . . . . . RESPONDENTS.

*Company—Foreign Company—Bonds—Principal and Interest to be paid "in sterling in gold coin of the United Kingdom of or equal to" a specified standard—Legal tender—Coinage Act,* 1870 (33 *Vict. c.* 10), *ss.* 3, 6—*Currency and Bank Notes Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 13), *s.* 1.

One F. was the holder of a bond for 100*l.*, one of a series of bonds issued in 1928 by a Belgian Company. Each bond provided for payment of 100*l.* on September 1, 1963, or at an earlier date in accordance with indorsed conditions, and of interest during the continuance of the security at the rate of 5½ per cent. per annum, "in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the first day of September, 1928," by equal half-yearly payments on every March 1 and September 1 in accordance with coupons attached thereto. One of the indorsed conditions provided that the bond should be construed and the rights of the parties regulated according to the law of England as a contract made and according to the terms thereof to be performed in England.

A half-yearly instalment of interest on the bond having fallen due, the Company claimed to pay the nominal sum specified in the coupon in whatever might be legal tender in England at the day of payment in full discharge of their obligation under the bond. Upon an originating summons, F., as plaintiff, claimed such a sum in sterling as would purchase in the market on the day of payment gold of the weight and fineness contained in the gold coin of the United Kingdom sufficient to discharge the payment if falling due on September 1, 1928.

*Held*, reversing the orders of Farwell J. and the Court of Appeal (1) that the plaintiff was entitled to a declaration that upon the true construction of the bond he was entitled as the holder thereof to receive from the Company from time to time by way of principal and interest thereunder and on the due dates of payment therefor such a sum in sterling as should represent the gold value of the nominal amount of each respective payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on September 1, 1928, and, where the nominal amount comprised a fraction of a pound, a sum in sterling representing a corresponding fraction of the gold value, ascertained as aforesaid, of a pound, part of the nominal amount aforesaid.

APPEAL from an order of the Court of Appeal (1), affirming a judgment of Farwell J. upon an originating summons entitled: "In the matter of a Thirty-five Year Sinking Fund 5½ per cent. Sterling Bond for 100*l*. numbered 0426 being part of an issue of 500,000*l*. such Bonds." The appellant was the plaintiff and the respondents were the defendants in the summons.

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* *Present:* LORD ATKIN, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(1) [1933] Ch. 684.

The facts are fully stated in the speech of Lord Russell of Killowen.

The summons was dated June 24, 1932. The plaintiff claimed:—

1. (*a*) A declaration that upon the true construction of the bond the respondents warranted to the plaintiff as holder thereof that they would discharge their obligations thereunder by tendering him in payment of the principal and interest due upon the bond at the times specified therein gold coin of the United Kingdom to the appropriate amount of or equal to the standard of weight and fineness existing on September 1, 1928.

(*b*) A declaration that in the event of any breach of such warranty on the part of the respondents the plaintiff, as such holder as aforesaid, is entitled to receive by way of damages a sum calculated in sterling sufficient to purchase in the market on the day of the breach the amount of gold coin of the United Kingdom which ought to have been tendered by the respondents in pursuance of their warranty.

2. Alternatively a declaration that upon the true construction of the bond the respondents are bound to tender to the plaintiff as holder thereof in discharge of the principal and interest from time to time due upon the bond at the times therein specified such a sum in sterling as may be sufficient to purchase in the market on the day of payment gold of not less weight and fineness than that contained in the gold coin of the United Kingdom which would have sufficed to discharge such payment if falling due on September 1, 1928.

On October 27, 1932, the summons was heard before Farwell J., who held that the plaintiff was not entitled to any of the declarations claimed, but that the bond imposed on the defendants an obligation to pay a sum of money which might be discharged by offering legal tender for that sum.

The plaintiff appealed. The Court of Appeal (Lord Hanworth M.R., and Lawrence and Romer L.JJ.) dismissed the appeal.

The plaintiff appealed to this House.

Nov. 10, 1933. *Sir William Jowitt K.C.*, *Lionel Cohen K.C.* and *Cyril Radcliffe* for the appellant. The question in this appeal is one of the construction of the bond and turns upon the meaning of the respondents' promise to pay "in sterling gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928"—words which for convenience are referred to as "the gold clause": Is the intention of those words to fix the amount to be paid, or to determine the manner in which an amount already fixed is to be discharged? Farwell J. decided in favour of the second alternative construction, and his decision has been followed by the Court of Appeal.

It is submitted that the former alternative is the one to be adopted, and that the object and intention of the clause are to fix the amount to be paid by the respondents. The lenders to the respondents foresaw the possibility of a retreat from the gold standard. Having made their loans on a gold basis they were careful to secure repayment on the same or equivalent terms. The construction adopted by the Courts below gives no effect whatever to the gold clause. That is not a construction to be adopted if another legal and probable construction can be found. The first alternative construction is both legal and probable and is therefore to be preferred. The result is that the appellant is entitled to such a sum as will purchase in sterling in London gold of the nominal amount of the payment due under the bond from time to time, the gold to be of the standard of weight and fineness existing on September 1, 1928. That standard was fixed by the Coinage Act, 1870, by s. 3 of which "All coins made at the Mint of the denominations mentioned in the first schedule to this Act shall be of the weight and fineness specified in

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that schedule" . . . . In the schedule the standard weight of a sovereign is specified as 123·27447 grains, Imperial weight; and the standard fineness as "eleven-twelfths fine gold, one-twelfth alloy; or millesimal fineness 916·66." Where the nominal amount of the payment includes fractions of a pound each fraction must represent the price in sterling in London of a corresponding fraction of 123·27447 grains of gold of the same standard of fineness. Thus the amount due from the respondents is ascertained.

If this be the true view, questions about the legality or validity of a clause providing for payment of a named sum in one alone of two or more forms of legal tender, or in some form other than by legal tender, do not arise; but if the House should be of opinion, with the Court of Appeal, that the bond in question stipulates for payment of 100*l.* and interest in gold there is nothing illegal in such a stipulation and it is therefore a valid contract: *Bronson* v. *Rodes* (1) and *Butler* v. *Horwitz* (2) in the Supreme Court of the United States; *The Case of Serbian Loans.* (3)

Nov. 13. *Gavin Simonds K.C.* and *H. S. G. Buckmaster* for the respondents. This bond is either an obligation to deliver gold coins, a contract for bullion or commodities, or it is an obligation to pay 100*l.* and interest. It is submitted that the second alternative is the true view of the contract. This was the view of the Court of Appeal. Then by s. 6 of the Coinage Act, 1870 (4), any contract to pay otherwise than according to the coins which are current and legal tender is, if not illegal, at the best void and of no effect.

Nov. 24. *Sir William Jowitt K.C.* replied.

(1) (1868) 7 Wallace, 229.

(2) (1868) 7 Wallace, 258.

(3) (1928) Permanent Court of International Justice, Series A. Collection of Judgments 1928–1929; Judgment No. 14.

(4) Coinage Act, 1870, s. 6. "Every contract, sale, payment, bill, note, instrument, and security for money, and every transaction, dealing, matter, and thing whatever relating to money, or involving the payment of or the liability to pay any money, which is made, executed, or entered into, done or had, shall be made, executed, entered into, done and had according to the coins which are current and legal tender in pursuance of this Act, and not otherwise, unless the same be made, executed, entered into, done or had according to the currency of some British possession or some foreign state."

The House took time for consideration.

Dec. 15. LORD ATKIN. My Lords, I have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen, and I agree with it and desire to adopt it. I wish to say also that my noble and learned friend Lord Warrington of Clyffe agrees with it.

LORD TOMLIN. My Lords, I also have had the opportunity of reading the opinion which is about to be delivered by my noble and learned friend Lord Russell of Killowen and I concur in it in all respects.

LORD RUSSELL OF KILLOWEN. My Lords, the point for decision in this case is one which primarily depends upon the true construction of the contract between the parties, the dispute being as to the way in which the obligations of the respondents as to principal and interest under a certain bond issued by them in the month of September, 1928, are properly dischargeable. The difficulty arises from the presence in the bond of what is sometimes known as a gold clause, and from the particular phraseology which it has assumed.

The respondents are a limited company incorporated under the laws of Belgium with their head office in Brussels. They issued a series of bonds of various denominations which were offered for sale by M. Samuel & Co., Ld., on September 25, 1928. The bonds are (except as to the principal amount secured thereby) identical in form.

The bond which is the subject of the present proceedings is couched as to its operative part in the following language :—

> 1. Société Intercommunale Belge d'Electricité (Société Anonyme), a Corporation organized and existing under the laws of Belgium (hereinafter called " the Company "), for value received will, on the 1st day of September, 1963, or on such earlier day as the principal moneys hereby secured become payable in accordance with the conditions endorsed hereon, pay to the bearer at the registered office of M. Samuel and Company, Limited (hereinafter called " the Bankers "),

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in London, England, the Fiscal Agent of the Company (or at the principal office of any successor Fiscal Agent) on presentation of this Bond the sum of 100*l.* in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928.

2. The Company will, during the continuance of this security, pay at the registered office of the Bankers (or at the principal office of any successor Fiscal Agent), interest thereon at the rate of 5½ per cent. per annum in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928, by equal half-yearly payments on every March 1 and September 1 in accordance with the coupons annexed hereto.

3. The principal of and interest on this Bond are payable without deduction or diminution for any taxes, assessments, charges or duties of any kind whatsoever, past, present or future, that may be levied or imposed by the Kingdom of Belgium, or by any Province, Commune, Municipality, or other Taxing Authority therein or thereof.

4. This Bond is one of an authorized issue of Bonds of the Company of an aggregate principal amount not exceeding 500,000*l.* in sterling in gold coin of the United Kingdom at any one time outstanding.

5. This Bond is issued subject to and with the benefit of the conditions endorsed hereon, which are to be deemed part of it."

The conditions referred to in clause 5 are twenty in number. I will refer to the relevant ones. No. 1 provides for a sinking fund. No. 2 enables the Company to redeem bonds on any interest payment date, beginning with September 1, 1933. No. 4 provides for increasing the amount of the payments under the bonds to meet the case of charges imposed by Belgian authorities which the Company may not legally assume and pay. No. 6 runs thus:—

"The bonds of this issue shall constitute and they and each of them hereby are declared to be the direct and unconditional liability and obligations of the Company in sterling in gold

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coin of the United Kingdom in accordance with the provisions of the bonds and these conditions."

No. 16 (*c*) provides that in case default shall be made as there mentioned then
"the Company upon the demand of the Bankers will pay to the Bankers for the benefit of the holders of the bonds and coupons then outstanding in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928, the whole amount which then shall have become due and payable on all such bonds and coupons then outstanding for interest or principal or both as the case may be."

No. 18 provides that the bond shall be construed and the rights of the parties regulated according to the Law of England and as a contract made and according to the terms thereof to be performed in England.

The coupons which are referred to in clause 2 of the bond, and in accordance with which the interest is to be paid, are each described on the front thereof as a coupon for 2*l.* 15*s.* being half-year's interest due on the particular date and "payable in accordance with the conditions endorsed hereon" at a place specified, less British Income Tax. The conditions endorsed on the coupons are in the following terms:—

"For 2*l.* 15*s.* 0*d.* in sterling in gold coin of the United Kingdom, of or equal to the standard of weight and fineness existing on the 1st day of September, 1928, without deduction or diminution for any taxes, assessments, charges or duties of any kind whatsoever past, present or future, that may be levied or imposed by the Kingdom of Belgium or by any Province, Commune, Municipality or other Taxing Authority therein or thereof."

I have cited to your Lordships the relevant contractual provisions of the bond: but upon the document itself are to be found certain figures and words of description to which attention must be called. The letterpress on the front of the document is enclosed in an ornamental rectangular border and in each of the two top corners are to be found the symbol and figures "£100." Inside the border and above clause 1 of the bond are the following words, figures and symbols :—

"Thirty-Five Year Sinking Fund 5½% Sterling Bond.
Due September 1st, 1963.
Part of a Total of £500,000 Bonds offered for sale on September 25th, 1928.
Issued in Bonds 50 of £1,000 each numbered 3301 to 3350 inclusive.
Issued in Bonds 300 of £500 each numbered 3001 to 3300 inclusive.
Issued in Bonds 3,000 of £100 each numbered 1 to 3000 inclusive.
Bond for One Hundred Pounds."

I mention these details because in the Courts below, upon the question of construction, some reliance was placed upon the fact that they were to be found inscribed upon the face of the document. It must, however, be borne in mind that they form no part of the contractual provisions of the bond ; they merely purport to be descriptive of the bonds. If upon a consideration of the contractual provisions, those provisions are open to more than one construction, descriptive words appearing elsewhere in the document may well assist in deciding which of the alternative constructions represents the intention of the parties ; indeed they may be decisive ; but if the contractual provisions reveal only one construction, outside descriptive words will not be competent to alter that construction. If they cannot be reconciled with it they become misdescriptive.

The question between the parties can now be stated. The Company claim, and it has so been decided in both Courts below, that they are entitled to satisfy the principal moneys and interest secured by the bond by tendering whatever might at the due date of payment be good legal tender for the nominal amount of the bond or coupon as the case may be. It is obvious that this decision deprives of all effect the words which occur in clauses 1 and 2 of the bond, viz. : "in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928." These words (which merely for convenience I will

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call the gold clause) need in this view never have been inserted at all.

The bondholder on the other hand contends that they were inserted for a specific purpose—namely, to protect the lender against any depreciation of sterling in terms of gold and that the gold clause, with its reference to gold coin of a defined standard of weight and fineness, is a clause which deals, not with the method in which a debt of fixed unvarying amount is to be discharged, but with the fixing of the amount of the debt to be discharged. Alternatively the bondholder says that if the bond is to be construed as a contract to pay in gold coins of the United Kingdom of the specified standard of weight and fineness, then he would on breach be entitled to equivalent damages.

Farwell J. thought the question of construction a difficult one, but he came to the conclusion that the contract was to pay 100*l.* and interest at 5½ per cent. as fixed sums, notwithstanding that such a condition involved giving no effect to the gold clause; and to pay those fixed sums by one particular form of legal tender and none other. He held that such a contract was not illegal, but that the respondents were notwithstanding it entitled to pay the fixed sums in any other form of legal tender. He made a declaration accordingly.

The Master of the Rolls, in effect I think, was of opinion that upon its true construction the contract was a contract to pay 100*l.* in manner prescribed by English Law, and was not a contract to pay a sum of money to be ascertained by calculation on the basis of a specified standard of gold.

Lawrence L.J. after much fluctuation of opinion came to the conclusion that the gold clause did not measure the liability, but indicated the mode in which a liability of fixed amount was to be discharged: and he held that an agreement to discharge a debt by one form of legal tender could not abrogate the enactment of the Legislature that the debt could be discharged by other forms of legal tender.

Romer L.J. took the same view as to construction—namely, that the contract was to pay sums of fixed amounts, but to pay them only "in a particular form of currency—namely, the gold currency as it existed on September 1, 1928, to the exclusion . . . . of all other forms of currency." Such a contract he held to be illegal under s. 6 of the Coinage Act, 1870, with the result not that the whole contract was unenforceable, but that the words which created the illegality must be treated as excluded.

My Lords, I share the views of Farwell J. and Lawrence L.J. that the question of construction is a difficult one, but after careful consideration of all the contractual provisions of the bond I have come to the conclusion that we should give to the gold clause the meaning and effect for which the bondholder primarily contends.

The Courts below in construing the bond have started with the assumption that the bond must be as is stated on its face a bond for 100*l.*; they then construe the words of the gold clause literally, and hold that its sole intention is to obtain payment in one particular form of tender only, and that that intention must be defeated by the operation of the law.

For myself I approach the question of construction in a different way. I consider first the state of affairs existing at the date of the bond. The Gold Standard Act, 1925, had exempted the Bank of England from obligation to pay its own notes in legal coin but had provided that such notes should not thereby cease to be legal tender. Further it had repealed the provision of the Currency and Bank Notes Act, 1914, entitling the holder of a currency note to be paid its face value in gold coin. It had, however, provided that the Bank of England should be bound to sell on demand gold bullion at the price and as therein specified to any person on demand but only in the form of bars containing approximately 400 ounces troy of fine gold. The Currency and Bank Notes Act, 1928, had received the Royal assent, though it did not come into operation until November 22, 1928. By that Act, the Bank of England was authorized to issue bank notes for 1*l.* and for 10*s.*, which were to be legal tender for any amount. Existing currency notes were converted into bank notes, the

Bank becoming liable upon them; and the Bank was empowered to require any person in the United Kingdom owning gold coin or bullion to an amount exceeding 10,000*l.* in value to sell it to the Bank on payment (in the case of gold coin) of the nominal value thereof. The country was on the gold standard but the notes were inconvertible and gold coin was substantially no longer in circulation.

These being the circumstances and conditions of the time it is not, I think, improper or hazardous to make two surmises, (1.) that the gold clause was inserted in clauses 1 and 2 of the bond in contemplation of the contingency of this country going (as it did in 1931) off the gold standard at some future date; and (2.) that neither party to the bond can have contemplated payment under the bond being actually made in gold coins.

I turn to the bond to see if from the contents of the document itself it is apparent that the parties did not use the words of the gold clause in accordance with the literal meaning which they would bear if considered apart from the rest of the document and the circumstances which surrounded its execution. A consideration of clause 2 will show, I think, that, as there used, the words must mean something other than what they say; for translating the 5½ per cent. by equal half-yearly payments into the appropriate figures, it becomes a provision for the payment of 2*l.* 15*s.* "in gold coin of the United Kingdom." The same consideration applies to the interest coupons, which with their express provision for deduction of income tax, would be purporting to provide for a payment "in gold coin of the United Kingdom" of a sum (to-day) of 2*l.* 1*s.* 3*d.* Again, if one looks at clause 4 of the bond, the reference which it contains to gold coin of the United Kingdom cannot bear its literal meaning. There is no issue or amount outstanding "in gold coin of the United Kingdom." Taking even clause 1 by itself it would be practically impossible to fulfil its literal requirements even if a sufficiency of gold coin were still in circulation, for according to its strict reading the coins tendered would all have to be coins of the exact standard of weight and exact standard of fineness specified in the Coinage Act, 1870, without remedy allowance or variation from the standards. Thus neither in clause 1 nor in clause 2 can the words have been intended by the parties to carry their literal interpretation.

I therefore ask myself this question. If the words of the gold clause cannot have been used by the parties in the sense which they literally bear, ought I to ignore them altogether and attribute no meaning to them, or ought I, if I can discover it from the document, to attribute some other meaning to them? Clearly the latter course should be adopted if possible, for the parties must have inserted these special words for some special purpose, and if that purpose can be discerned by legitimate means, effect should be given to it.

In my opinion the purpose can be discerned from clause 4, in which the reference to gold coin of the United Kingdom is clearly not a reference to the mode of payment but to the measure of the Company's obligation. So too, condition 6, which again is a clause not directed to mode of payment, but to describing and measuring liability, shows that the words are used as such a measure. In just the same way I think that in clauses 1 and 2 of the bond the parties are referring to gold coin of the United Kingdom of a specific standard of weight and fineness not as being the mode in which the Company's indebtedness is to be discharged, but as being the means by which the amount of that indebtedness is to be measured and ascertained. I would construe clause 1 not as meaning that 100*l.* is to be paid in a certain way, but as meaning that the obligation is to pay a sum which would represent the equivalent of 100*l.* if paid in a particular way, in other words I would construe the clause as though it ran thus (omitting immaterial words) "pay . . . . in sterling a sum equal to the value of 100*l.* if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September, 1928." I would similarly construe clause 2.

I am conscious, my Lords, that this construction strains the words of the document, and that it fits awkwardly with some

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of its provisions. Thus, for instance, the half-yearly payments in accordance with the coupons (which are described in clause 2 as equal) may in fact not be equal. But I prefer this to the only other alternatives—namely, attributing no meaning at all to the gold clause, or attributing to it a meaning which from other parts of the document and the surrounding circumstances the parties cannot have intended it to bear.

We were in the course of the argument referred to certain decisions and judgments in cases which came before the Permanent Court of International Justice sitting at The Hague. I do not, I need hardly say, treat these as in any way binding upon us. Indeed the relevant facts and words under consideration were very different from those which have been under consideration here. I would like, however, to cite one passage as stating happily and succinctly the considerations and principles which have influenced me in arriving at the conclusion which I have reached. It occurs in the judgment dealing with certain Serbian loans stated to be payable both as to principal and interest in gold. It runs thus (1) :—

"As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous, and as the definitive use of the word 'gold' cannot be ignored, the question is : What must be deemed to be the significance of that expression ? It is conceded that it was the intention of the parties to guard against the fluctuations of the Serbian dinar, and that, in order to procure the loans, it was necessary to contract for repayment in foreign money. But, in so contracting, the parties were not content to use simply the word 'franc,' or to contract for payment in French francs, but stipulated for 'gold francs.' It is quite unreasonable to suppose that they were intent on providing for the giving in payment of mere gold specie, or gold coins, without reference to a standard of value. The treatment of the gold clause as indicating a mere modality of payment, without reference to a gold standard of value, would be, not to construe but to destroy it."

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(1) Case of Serbian Loans, Permanent Court of International Justice, Series A, Nos. 14–21, Collection of Judgments, 1928–1929; Judgment No. 14, p. 32.

I would allow this appeal and substitute for the declaration made by Farwell J. a declaration in the following terms: "Declare that upon the true construction of the bond the appellant is entitled as holder thereof to receive from the respondents from time to time by way of principal and interest thereunder and on the due dates of payment therefor such a sum in sterling as represents the gold value of the nominal amount of each respective payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on September 1, 1928, and that accordingly every 'pound' comprised in the nominal amount of each such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of 123·27447 grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act, 1870, and any fraction of a 'pound' comprised in the nominal amount of any such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of a corresponding fraction of 123·27447 grains of gold of the same standard of fineness."

The view which I take upon the question of construction renders it unnecessary for me to consider the other questions which were debated upon the hearing of the appeal. They do not arise. It would be unwise and I do not desire to deal with the question whether an effective bargain can be made for a debt to be paid only in one form of legal tender. Still less do I desire to express a view as to the meaning and effect of s. 6 of the Coinage Act, 1870.

Lord Wright. My Lords, I fully agree in the reasoning and conclusions expressed in the speech just delivered by my noble and learned friend, Lord Russell of Killowen.

*Order of the Court of Appeal reversed. Cause remitted to the Chancery Division with a Direction to Declare that upon the true*

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*construction of the Bond the appellant is entitled as the holder thereof to receive from the respondents from time to time by way of principal and interest thereunder, and on the due dates of payment therefor, such a sum in sterling as represents the gold value of the nominal amount of each payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on September* 1, 1928, *and that accordingly every "pound" comprised in the nominal amount of each such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of* 123·27447 *grains of gold of the standard of fineness specified in the First Schedule to the Coinage Act,* 1870, *and any fraction of a "pound" comprised in the nominal amount of any such payment must be treated as representing the price in London in sterling (calculated at the due date of payment) of a corresponding fraction of* 123·27447 *grains of gold of the same standard of fineness. Further ordered that the respondents pay the appellants the costs of the appeal to this House.*

*Lords' Journals*, Dec. 15, 1933.

Solicitors for appellant: *Allen & Overy.*
Solicitors for respondents: *Stephenson, Harwood & Tatham.*

*Applied.* Robertson *v.* Minister of Pensions. [1948] 2 All E.R. 767.

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C. B. REILLY . . . . . . . . . APPELLANT ;

AND

THE KING . . . . . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada—Crown—Appointment to statutory Office—Abolition of Office—Repeal of Statute—Claim to damages—Breach of contract—Interpretation Act* (*R. S. Can.*, 1927, *c.* 1), *s.* 19 (*c*).

In pursuance of an Order in Council the appellant was appointed by letters patent to be a member of a Board established by a statute of Canada which specified the period of the appointment and the salary attaching to it. During the currency of the appointment, as extended by subsequent Orders in Council, the Parliament of Canada abolished the office by repealing the provision which established the Board; no compensation to the member was provided. By a petition of right the appellant claimed damages for breach of contract:—

*Held*, that the claim failed, because so far as the appellant's rights were contractual further performance of the contract had become impossible by statute; as any right under the appointment was subject to determination in that manner, the Interpretation Act, s. 19 (*c*), which preserves rights acquired under a repealed enactment, did not assist the appellant, and the repealing statute did not interfere with any civil right in the Province.

If the terms of an appointment prescribe its period and provide expressly that it may be terminated for cause, a power to dismiss at pleasure cannot be implied.

Judgment of the Supreme Court of Canada [1932] S. C. R. 597 affirmed upon a different ground.

APPEAL (No. 20 of 1933) by special leave from a judgment of the Supreme Court of Canada (June 15, 1932) affirming a judgment of the Exchequer Court (November 27, 1931).

The appellant having been appointed to a statutory office—namely, a member of the Federal Appeal Board, and having lost the office during its specified currency by reason of the repeal by the Dominion Parliament of the statutory provision which created it, claimed by petition of right damages for breach of contract.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and SIR LANCELOT SANDERSON.

The facts appear from the judgment of the Judicial Committee.

The claim was rejected by the Exchequer Court of Canada, by a judgment delivered by the President, Maclean J.

An appeal to the Supreme Court of Canada (Anglin C.J. and Rinfret, Lamont, Cannon and Orde JJ.) was dismissed, though upon grounds differing slightly from those of Maclean J.

The proceedings in the two Courts are reported at [1932] Ex. Ct. R. 14 and [1932] S. C. R. 597 respectively.

1933. Nov. 27. *Redmond Quain K.C.* for the appellant.

*Wilfrid Greene K.C.* and *Stuart Edwards K.C.* for the respondent.

The arguments on behalf of the appellant appear from the judgment. Counsel for the Crown were not called upon.

Dec. 13. The judgment of their Lordships was delivered by

LORD ATKIN. This is an appeal from the Supreme Court of Canada, which affirmed a decision of Maclean J. in the Exchequer Court of Canada, dismissing a petition of right in which the present appellant, Mr. Reilly, was the suppliant. The suppliant's case was that, in pursuance of the Pensions Act, he had on August 16, 1928, been appointed a member of the Federal Appeal Board for a term of five years; that, in breach of contract, he had been dismissed in October, 1930, and he claimed damages.

There is no dispute as to the facts. By an Act to Amend the Pensions Act, c. 62 of the Statutes of Canada, 1923, there was constituted a Board under the title, "The Federal Appeal Board," consisting of not less than three nor more than seven members appointed by the Governor-in-Council on the recommendation of the Minister of Justice. One of the members was to be appointed by the Governor-in-Council chairman of the Board, "and shall hold that office during pleasure, and any member may be removed for cause at any time by the Governor-in-Council." Of the members first appointed to the Board other than the Chairman one-half were to be appointed for a term of two years, and the others for a term of three years, and they were to be eligible for reappointment for such further terms not to exceed five years as the Governor-in-Council may deem advisable. The chairman was to be paid a salary of seven thousand dollars a year ; the other members six thousand, to be paid monthly out of any unappropriated money forming part of the Consolidated Revenue Fund of Canada. R. S. Can. 1927, c. 157, s. 50.

The appellant, Mr. Reilly, was in 1923 a practising member of the bar of Quebec. On August 17, 1923, in pursuance of an Order in Council, he was appointed by letters patent under the great seal of Canada a member of the Federal Appeal Board for the term of three years. The appointment was extended by Orders in Council of June 4, 1926, and August 18, 1927, and by an Order in Council of August 16, 1928, was extended for a further five years, [provided that the appointment might be terminated at any time in the event of the reduction in the Board's work to an extent sufficient to permit of its performance by fewer commissioners.] This event never arose. But on May 30, 1930, the Canadian legislature passed " An Act to Amend the Pension Act," Statutes of Canada, 1930, c. 35. By s. 14 of that Act s. 50 of the Pensions Act, as amended by subsequent Acts, was repealed, and by s. 9 a Pensions Tribunal was constituted, consisting of a chairman and eight other members, with salaries of $7000 and $6000 respectively, to hold office for ten years, subject only to earlier removal for cause. By s. 10 a Pension Appeal Court was constituted, consisting of a president and two other members. Their tenure was the same as that of the members of the Pension Tribunal ; their salaries were to be respectively $8000 and $7000 a year. Mr. Reilly's office was thus abolished : neither he nor any of the members was appointed to the new Tribunal or Court ; nor was any compensation paid to any of them. In October, 1930, Mr. Reilly was requested to vacate the premises he had occupied in pursuance of his office.

The petition of right is founded on averments that there was a contract between the suppliant and the Crown and that the contract had been broken. Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds. Maclean J. concluded that the relation between the holder of a public office and the Crown was not contractual. There never had been a contract: and the foundation of the petition failed. Orde J.'s judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.

Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould* v. *Stuart*. (1) That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Exchequer Court that the relations between the Crown and the holder of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other. And in this connection it will be important to bear

(1) [1896] A. C. 575.

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in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined.

But the present case appears to their Lordships to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged. In the present case the office held by the appellant was abolished by statute: thenceforward it was illegal for the executive to continue him in that office or pay him any salary: and impossible for him to exercise his office. The jurisdiction of the Federal Appeal Board was gone. The position, therefore, seems to be this. So far as the rights and obligations of the Crown and the holder of the office rested on statute, the office was abolished and there was no statutory provision made for holders of the office so abolished. So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged. It is perhaps unnecessary to add that discharged means put an end to and does not mean broken. In the result, therefore, the appellant has failed to show a breach of contract on which to found damages.

It was, however, contended that this result is avoided by the provisions of the Interpretation Act, R. S. Can. 1927, c. 1, s. 19: "Where any Act or enactment is repealed—then unless the contrary intention appears, such repeal or revocation shall not . . . . (*c*) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act, enactment or regulation so repealed or revoked."

The answer is obvious. There was no right acquired under the appointment to the office except a right which from the inception was subject to be determined by the office being abolished by statute. The propositions which establish that there was no breach of contract negative any protection under this section.

Finally, and almost inevitably in such a case, an appeal was made to the British North America Act, and it was said that legislation abolishing the office without compensation was an interference with "property and civil rights." But, as before, if the right was in itself determinable by statute, there was no interference with it.

It would be strange that the Dominion should have power to create an office but no power to abolish it except on the terms of awarding compensation apparently for the full term of the original office. The case on this point may be put in two ways. Either the Act of 1930 did not interfere with any civil right, or, if it did, its interference was necessarily incident to the undoubted power of the Dominion to abolish the old and create the new office. For the reasons above given the former seems preferable, but either will suffice.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondent: *Charles Russell & Co.*

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[PRIVY COUNCIL.]

J. C.*
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*Feb.* 2.

VANCOUVER MALT AND SAKE BREWING COMPANY, LIMITED . } APPELLANTS;

AND

VANCOUVER BREWERIES, LIMITED . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

*Canada (British Columbia)—Restraint of Trade—Contract for sale of goodwill of Brewer's licence—Covenant by vendors not to brew beer—Bare covenant against competition—Covenant unlimited in area.*

The appellants held a (Dominion) brewer's licence, renewable each year, in respect of their premises in Vancouver City, but had never brewed any liquor other than sake, a Japanese liquor made from rice.

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* *Present:* LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT, and SIR LANCELOT SANDERSON.

Under a similar licence the respondents carried on a brewing business in Vancouver City, but brewed beer only. There were no other brewers operating in the City, but there were a few others elsewhere in the Province. By an agreement made in 1927 the appellants purported to sell and assign to the respondents for $15,000 all the goodwill of their brewer's licence or any renewal thereof (except so far as related to the manufacture of sake), and to covenant that for fifteen years they would not engage in the trade or business of manufacturing or selling beer, also that if they should sell their licence the sale should be made subject to the foregoing conditions :—

*Held*, that the agreement was an unenforceable agreement in restraint of trade, because in reality it was a bare covenant against competition, also because it was unreasonable between the parties, as the restriction was unlimited in area.

Judgment of the Court of Appeal of British Columbia, 47 B. C. Rep. 89, reversed.

APPEAL (No. 41 of 1933) from a judgment of the Court of Appeal of British Columbia (January 27, 1933) affirming a judgment of McDonald J. (June 7, 1932).

The respondents brought an action against the appellants in the Supreme Court of British Columbia for a declaration that an agreement between the parties dated December 5, 1927, was valid and subsisting, and claiming an injunction.

The terms of the agreement, and the circumstances in which it was made, appear from the judgment of the Judicial Committee.

The appellants by their defence pleaded that the agreement was contrary to public policy and unenforceable, as it was an unreasonable restraint of trade ; and that it was illegal under provisions of the Criminal Code of Canada. They pleaded further that the agreement was invalid also because its execution had not been duly authorized by a resolution of the directors of the appellant company.

The trial judge (McDonald J.) made the declaration sought, and granted an injunction.

The judgment was affirmed by the Court of Appeal (Macdonald C.J.B.C., and Martin, Galliher and M. A. Macdonald JJ.A. ; McPhillips J.A. dissenting). McPhillips J.A. was of opinion that the contract was against public policy and unduly in restraint of trade, and that it was unenforceable ; further, that it was a contract unduly to prevent or lessen

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competition and therefore contrary to s. 498 of the Criminal Code (R. S. Can., 1927, c. 36). Having regard to the nature of the contract he doubted whether its execution could be presumed to have been duly authorized. The appeal is reported at 47 B. C. Rep. 89.

1933. Dec. 1, 4, 5, 7. *Wilfrid Greene K.C.* and *Cyril Radcliffe* for the appellants. The agreement was an unlawful restraint of trade and was therefore void. It was aimed at eliminating competition and creating a monopoly. Under their licence the appellants had an unrestricted right to brew; they could have installed the plant for brewing beer and upon application obtained the right to use it: Excise Act (R. S. Can., 1927, c. 60), ss. 5, 12, 23, 34. There was no subject-matter of the purported sale. The licence was personal to the appellants and not assignable under the Act; they had no goodwill of a beer brewing business to sell. The covenant therefore was in reality a bare covenant not to brew beer. Although the validity of covenants in partial restraint of trade has been recognized where they are for the reasonable protection of the covenantee's business, as when annexed to a sale of the goodwill or to a contract of employment, a covenant in gross against competition is contrary to public policy and void: *Townsend* v. *Jarman* (1); *British Reinforced Concrete Engineering Co., Ld.* v. *Schelff.* (2) The agreement being in restraint of trade is invalid unless it is shown to be both consistent with the interest of the public and reasonable between the parties: *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ld.* (3) As the agreement was contrary to the public interest no question arises as to its reasonableness. But if that question arises the covenant was not reasonable between the parties, because it was unlimited in area. [Reference was made also to *Leather Cloth Co.* v. *Lorsont* (4); *Maxim Nordenfelt Guns & Ammunition Co., Ld.* v. *Nordenfelt* (5); *Mason* v. *Provident Clothing &*

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(1) [1900] 2 Ch. 698, 702, 703.
(2) [1921] 2 Ch. 563, 576.
(3) [1919] A. C. 548, 562, 563.
(4) (1869) L. R. 9 Eq. 345, 354.
(5) [1893] 1 Ch. 630, 647; [1894] A. C. 535, 548.

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*Supply Co., Ld.* (1); *Herbert Morris, Ld.* v. *Saxelby* (2); *Attwood* v. *Lamont* (3); *Att.-Gen. of Australia* v. *Adelaide Steamship Co., Ld.* (4); *North Western Salt Co., Ld.* v. *Electrolytic Alkali Co., Ld.* (5); *English Hop Growers, Ld.* v. *Dering* (6); *Palmolive Co. (of England), Ld.* v. *Freedman.* (7)] The agreement moreover was contrary to s. 498 of the Criminal Code of Canada, as it injured trade by unduly preventing competition. [It was contended further that the agreement was invalid, because its execution had not been authorized by a resolution of the directors of the appellant company, authorities being referred to. Upon that question the respondents were not called upon, and it became unnecessary to deal with it in the judgment.]

*J. W. de B. Farris K.C.* and *Wilfrid Barton* for the respondents. The validity of the agreement depends upon its substance, not upon its form. It is conceded that restrictive covenants are generally annexed to a sale of goodwill while in this case the reverse was the case. The agreement was one between two commercial companies contracting on equal terms for their mutual benefit. In substance it was that the respondents should pay $15,000 to assist the appellants in their business of sake brewing, and that in consideration of that payment the appellants would not engage in brewing beer, which they had shown no intention of doing. There is no rule of law that an agreement which may restrict trade is necessarily void apart from the circumstances of the case. The true test is whether it is reasonable between the parties and having regard to the public interest: *Nordenfelt* case (8); *North Western Salt Co., Ld.* v. *Electrolytic Alkali Co., Ld.* (9) The parties themselves were the best judges of what was reasonable between them. Though in terms the covenant was unlimited in area it was in fact limited to the Province, as it was in relation to the licence. A restrictive covenant should be read in relation to the purpose of the agreement:

(1) [1913] A. C. 724.
(2) [1916] 1 A. C. 688.
(3) [1920] 3 K. B. 571.
(4) [1913] A. C. 781.
(5) [1914] A. C. 461.
(6) [1928] 2 K. B. 174.
(7) [1928] Ch. 264.
(8) [1893] 1 Ch. 630, 646; [1894] A. C. 535, 547, 562.
(9) [1914] A. C. 461, 473.

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*Collins* v. *Locke.* (1) There was no evidence that the agreement tended to create a monopoly. There were other licence holders in the Province, and further licences could be granted if necessary in the public interest. It is in the public interest that the appellants should remain bound by a contract, which they entered into deliberately: *English Hop Growers, Ld.* v. *Dering.* (2) A covenant in gross restricting trade may be valid if it is reasonable in the circumstances of the case. So far as *Schelff's* case (3) decided otherwise it is not supported by the authorities. *Stewart* v. *Stewart* (4) is an example of a bare covenant in restraint of trade. [In addition to cases already mentioned reference was made to *Mitchel* v. *Reynolds* (5); *Horner* v. *Graves* (6); *Wickens* v. *Evans* (7); *Shrewsbury & Birmingham Ry. Co.* v. *L. & N.W. Ry. Co.* (8); *Ballachulish Slate Quarries Co., Ld.* v. *Grant.* (9)]

*Wilfrid Greene K.C.* replied.

1934. Feb. 2. The judgment of their Lordships was delivered by

LORD MACMILLAN. The appellants challenge in these proceedings the validity of an agreement in writing which they made with the respondents on December 5, 1927. Having been advised that the agreement was not binding upon them, they intimated to the respondents that they proposed to act in disregard of it, whereupon the respondents brought the present action in the Supreme Court of British Columbia claiming a declaration that the agreement was valid and subsisting and enforceable by them against the appellants and an injunction restraining the appellants from acting in contravention of its terms. The appellants in their statement of defence pleaded that the agreement was "contrary to public policy, illegal, void and unenforceable as being [inter alia] an unreasonable and unnecessary restraint of trade in respect of the manufacture and sale of articles of commerce."

(1) (1879) 4 App. Cas. 674.
(2) [1928] 2 K. B. 174, 181.
(3) [1921] 2 Ch. 563.
(4) (1899) 1 F. 1158.
(5) (1711) 1 P. Wms. 181, 190; 1 Sm. L. C. (13th ed.), 462, 468.
(6) (1831) 7 Bing. 735.
(7) (1829) 3 Y. & J. 318.
(8) (1851) 21 L. J. (Q. B.) 89.
(9) (1903) 5 F. 1105.

This defence, and others which were stated by the appellants but which need not be detailed here, failed before McDonald J., who granted the declaration sought and also an injunction though in less wide terms than claimed. His judgment was affirmed by a majority of the Court of Appeal (Macdonald C.J.B.C. and Martin, Galliher and M. A. Macdonald JJ.A.; McPhillips J.A. dissenting). Hence the present appeal to His Majesty in Council.

The material facts are not in dispute. In 1923 the appellants were incorporated under the Companies Act of British Columbia as a private limited company under the name of the Vancouver Malt and Sake Brewing Co., Ld. The objects of the company as set out in the memorandum included the carrying on of "the business of brewers and maltsters in all their branches." At the date of the agreement in question the appellants held a licence under the Dominion Excise Act authorizing them "to carry on the trade or business of a brewer of malt liquors" in their premises in Vancouver. By virtue of the definitions contained in s. 5 of the Excise Act this licence authorized them to manufacture beer, ale, porter, lager beer and all other fermented liquor made in whole or in part from malt, grain or any saccharine matter. In point of fact, however, they had never brewed any liquor other than sake, a Japanese liquor made from rice, and their plant was adapted to the manufacture of this liquor only. Their business was apparently confined to the Province of British Columbia, where the only permitted customer within the Province was the Government Liquor Control Board. Export trade was unrestricted, but the appellants did not engage in it. The respondents, Vancouver Breweries, Ld., who were incorporated in 1912 under the British Columbia Companies Act, also held a brewer's licence and carried on the business of brewers in Vancouver, but they brewed beer only. They had some, but not much, export business with China, and the beer which they manufactured was for the most part disposed of within the Province to the Government Liquor Control Board. According to the evidence the only breweries in operation in the city of Vancouver in 1927 were those of

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the appellants and the respondents. There were a few breweries operating in other parts of the Province.

In 1927 negotiations were entered into between the respondents and the appellants, who were then apparently not very prosperous, the outcome of which was the agreement now in question. In the agreement the appellants are called "the vendor" and the respondents "the purchaser." The terms of it, which it is necessary to set out at length, are as follows:—

"Whereas the vendor is the holder of a brewer's licence under the Excise Act and is engaged in the manufacture of Sake in the Province of British Columbia.

And whereas the purchaser is desirous of purchasing from the vendor the goodwill of the said brewer's licence and any renewal or renewals thereof so far as the same relates to the manufacture and sale of beer, ale, porter, or lager beer.

Now therefore this agreement witnesseth that in consideration of the premises and of the sum of $15,000.00 now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged) the vendor has bargained, sold, transferred and assigned unto the purchaser, and does hereby bargain, sell, transfer and assign to the said purchaser all its right, title, interest, claim and demand in, to or out of the goodwill of the said brewer's licence or any renewal or renewals thereof (except insofar as the same relates to the manufacture, sale and distribution of sake).

And the vendor for itself, its successors and assigns covenants and agrees with the purchaser that during a period of fifteen years from the date hereof it will not engage in nor carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer, and will not brew, manufacture or sell any article or articles made in imitation thereof other than sake, either by itself or through its servants or agents or otherwise.

And the vendor further covenants that if at any time it shall sell its licence to brew or any renewal or renewals thereof any such sale shall be made subject to the foregoing conditions.

And the vendor further covenants that at no time during the said period of fifteen years will it be concerned directly or indirectly either as principal, agent, manufacturer, servant, financier or otherwise in any brewing business other than that of sake, and in event of any breach of the covenants herein contained will pay to the purchaser the sum of $15,000.00 to be recoverable upon every breach of this covenant as agreed in liquidated damages."

The terms of this document are certainly peculiar. It purports to be an agreement for the sale and purchase of the goodwill of the appellants' brewer's licence except in so far as it relates to the manufacture, sale and distribution of sake. As it is expressed in the narrative, the desire of the respondents was to purchase the goodwill of the appellants' brewer's licence so far as relating to the manufacture and sale of beer, ale, porter and lager beer. What exactly is meant by the goodwill of a licence or part of a licence, it is difficult to conceive. The subject-matter of the sale was not the goodwill of the appellants' business. The only business in which they were engaged was the brewing of sake, and the goodwill of their licence so far as relating to sake was expressly excluded from the sale. They had no goodwill to sell so far as regards the brewing of beer. Nor was the appellants' licence itself, even in part, the subject-matter of the sale. Presumably it could not be, for a licence is personal and not transferable by sale. There was in fact no sale of anything.

As Mr. Farris in his admirable argument very frankly put it, the primary object of the agreement is to be found not in the sale but in the restrictive covenants. It was a case, he said, not of restrictive covenants in aid of a sale, but of a sale in aid of restrictive covenants. It may be shrewdly suspected that the draftsman had read certain well known cases on contracts in restraint of trade and was aware of the difficulty of supporting a bare agreement not to compete unrelated to any other contract ; he consequently invented the imposing façade of a sale, which sold nothing, in order to conceal the nakedness of the restrictive covenants which were the real object of the transaction. Stripped of its adventitious trappings, the agreement is nothing more or less than a contract whereby in consideration of a sum of money the appellants undertake for a period of fifteen years not to engage in the business of brewing beer and to confine themselves solely to the business of brewing sake. Indeed, Mr. Reifel, the president of the respondents, when asked in cross-examination: "You were paying $15,000 for the purpose of preventing that company [the appellants] from competing with you?" replied "Yes." The question is whether such a contract is legally binding and enforceable.

Their Lordships had the benefit of a full discussion of the law relating to contracts in restraint of trade, and many decisions and dicta were quoted. It is no doubt true that the scope of a doctrine which is founded on public policy necessarily alters as economic conditions alter. Public policy is not a constant. More especially is this so where the doctrine represents a compromise between two principles of public policy; in this instance, between, on the one hand, the principle that persons of full age who enter into a contract should be held to their bond and, on the other hand, the principle that every person should have unfettered liberty to exercise his powers and capacities for his own and the community's benefit. But that the law against contracts in restraint of trade, whatever be its precise scope at any given time, is a doctrine of full force and vitality at the present day cannot be gainsaid. The law does not condemn every covenant which is in restraint of trade, for it recognizes that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser. But when a covenant in restraint of trade is called in question the burden of justifying it is laid on the party seeking to uphold it. The tests of justification have been authoritatively defined by Birkenhead L.C. in these words: "A contract which is in restraint of trade cannot be enforced unless (*a*) it is reasonable as between the parties; (*b*) it is consistent with the interests of the public. . . . Every contract therefore which is impeached as being in restraint of trade must submit itself to the two standards indicated. Both still survive": *McEllistrim* v. *Ballymacelligott Co-operative Agricultural and Dairy Society, Ld.* (1)

The restrictive covenants in the present agreement, when submitted to these tests, are at once seen to present unusual features. They are not inserted as being reasonably necessary to render a sale effectual in the interests of both parties, for there is no transaction of sale to be protected. Nothing has been sold. Nor is it a case of an arrangement among traders to submit themselves to mutual restrictions on their activities in the common interest of all the parties. It is simply a case of the appellants undertaking to the respondents in consideration of a sum of money paid to them that they will not for fifteen years carry on a particular branch of business. That is the whole substance of the agreement. If there was any sale, it was a sale by the appellants of their liberty to brew beer and a purchase by the respondents of protection against the possible competition of the appellants in the brewing of beer. In the case just quoted, the Lord Chancellor stated (2) that "the respondents were not entitled to be protected against mere competition," and so far as their Lordships are aware there is no case in the English Law Reports, and certainly none was cited at the bar, in which a bare covenant not to compete has been upheld. The covenants restrictive of competition which have been sustained have all been ancillary to some main transaction, contract, or arrangement, and have been found justified because they were reasonably necessary to render that transaction, contract or arrangement effective. Mr. Farris, however, invoked and relied on the Scottish case of *Stewart* v. *Stewart*. (3) In that case a photographer in Elgin obtained from his brother, who had been his assistant, an agreement whereby his brother, in consideration of a loan of 5*l*., bound himself not to carry on the business of a photographer, or to enter into the employment

(1) [1919] A. C. 548, 562. (2) Ibid. 563.
(3) 1 F. 1158.

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of any photographer, in Elgin or within twenty miles thereof. The Second Division of the Court of Session, by a majority, held this to be a legal and enforceable obligation. Lord Young dissented with characteristic vigour. The circumstance that the restraint was locally limited was obviously a material element in the decision that the contract was reasonable in the circumstances. Their Lordships are not prepared to express approval of this decision; but it is perhaps enough to say that the contract there differed in the material respect of its local limitations from the agreement now under consideration. In another Scottish case referred to by Mr. Farris, *Ballachulish Slate Quarries Co., Ld.* v. *Grant* (1), there was the important distinction that the restrictive obligation was ancillary to a contract of employment.

In their Lordships' opinion not only are the restrictive covenants of the present agreement open to the objection that they constitute a purchase of protection "against mere competition," but the terms themselves of the covenants are in any event so wide that they cannot pass the test of reasonableness as between the parties. The restrictions are not confined to Vancouver, or even to the Province of British Columbia; they prevent the appellants from manufacturing beer anywhere in the world. This, in their Lordships' view, is in itself a sufficient ground on which to condemn them. World-wide restrictions have passed muster in the Courts, but only where the restrictions to be reasonably effectual had to be world-wide. Here, even if it was legitimate for the respondents to buy protection for their Vancouver business, which their Lordships are far from accepting, it was out of all reason to place an embargo on the appellants brewing beer anywhere. Mr. Farris maintained that the restrictions limited themselves by practical considerations to the Province, and that this limitation should be held to be implied as a matter of construction. But it is not so nominated in the bond, and their Lordships see no reason to import a limitation which the parties have not seen fit to express, in order to aid so unprecedented a contract. Nor did it help the respondents'

(1) 5 F. 1105.

case to point out that the appellants were badly in need of the $15,000 to enable them to improve their plant and carry on their business, and so to argue that the contract was to their benefit and even to the public benefit by enabling them to avoid closing down or insolvency. The receipt of a sum of money can generally be shown to be advantageous to a business man, but his liberty to trade is not an asset which the law will permit him to barter for money except in special circumstances and within well recognized limitations.

The agreement being thus, in their Lordships' view, invalid and unenforceable for the reasons stated, it is unnecessary to say anything about certain other objections to it which were referred to by the appellants and dealt with in the Courts below.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the judgments of the Supreme Court and the Appeal Court of British Columbia be recalled, and the action be dismissed. The appellants will have their costs here and below.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondents : *Gard, Lyell & Co.*

[PRIVY COUNCIL.]

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SOLLOWAY . . . . . . . . . . . . . . APPELLANT;

AND

JOHNSON . . . . . . . . . . . . . . RESPONDENT.

## ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

*Canada (British Columbia)—Stock Exchange—Dealings between Brokers—Principal and Agent—Undisclosed Principal—Bankruptcy of Brokers—Action by Trustee in Bankruptcy—Fraud of company—Liability of director.*

The appellant was a director of S. M. & Co., a Canadian stock brokerage company with several branches. T. F. & Co. were a stock brokerage company carrying on business at a town in British Columbia where there was no stock exchange. In April, 1928, S. M. & Co. agreed to accept orders from T. F. & Co. for the sale and purchase of shares, both for cash and on open account, and to divide the commissions with them; T. F. & Co. were to provide 33⅓ per cent. as margin. T. F. & Co. made numerous contracts with S. M. & Co. in pursuance of orders from their clients, also some on their own behalf. The contract notes were all in the name of T. F. & Co., who did not send them to their clients, but a separate contract was made for each order. Money paid to T. F. & Co. by their clients went into their general account. S. M. & Co. knew that the transactions were entered into by T. F. & Co. mainly, at least, on behalf of their clients. In September, 1929, T. F. & Co. became bankrupt; the respondent was trustee in the bankruptcy. In an action brought by him as trustee he obtained judgment for the return of all sums paid by T. F. & Co. to S. M. & Co. on transactions upon open account, and against the appellant for the amount of those sums as damages. The grounds were that S. M. & Co. adopted a fraudulent system of not making independent contracts in respect of shares dealt in, and that the appellant was a party thereto. There was no appeal by S. M. & Co.:—

*Held*, that the judgment against the appellant should be set aide, because T. F. & Co.'s clients were undisclosed principals to the contracts made upon their orders, and the respondent therefore could not maintain the action as to those contracts, and because the action failed as to all the contracts in the absence of evidence that the fraudulent system had been used in connection with any particular contract; further, that even if the judgment could be sustained against the company, the appellant was not liable in the absence of proof of loss.

*Rothschild* v. *Brookman* (1831) 5 Bli. N. S. 165 discussed.

Judgment of the Court of Appeal of British Columbia, 46 B. C. Rep. 260, reversed.

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* *Present:* LORD BLANESBURGH, LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

APPEAL (No. 25 of 1933) from a judgment of the Court of Appeal of British Columbia (October 4, 1932) affirming a judgment of Fisher J. (February 15, 1932).

The appeal related to transactions in buying and selling shares between Theo. Frontier & Co., Ld., and Solloway, Mills & Co., Ld., each of which companies carried on a brokerage business. The appellant was the president, and the chief shareholder in the latter company; the respondent was trustee in the bankruptcy of the former company.

In an action brought in the Supreme Court of British Columbia by the respondent as trustee in the bankruptcy, he obtained a judgment against Solloway, Mills & Co., Ld., for the return, with interest, of sums received by them from the bankrupts in respect of certain transactions in shares between April, 1928, and the bankruptcy, on the footing that the transactions were avoided owing to the fraud of the defendant company, also against the appellant and another director for the same amount as damages on the ground that they had been parties to the fraud. The judgment was affirmed by the Court of Appeal, M. A. Macdonald J.A. dissenting as to the liability of the appellant and the other director.

The facts appear from the judgment of the Judicial Committee.

1933. June 22, 23, 26, 27, 29, 30; July 4. *W. P. Farris K.C.* and *Wilfrid Barton* for the appellant.

*G. L. Fraser* for the respondent.

1934. Jan. 15. The judgment of their Lordships was delivered by

LORD BLANESBURGH. In the action in the Supreme Court of British Columbia out of which this appeal arises, the defendants were Solloway, Mills & Co., Ld. (hereinafter referred to as "the Solloway Co."), a large brokerage Dominion company, having its head office in Toronto, with many branches throughout Canada and beyond; Isaac William Cannon Solloway and Harvey Mills, the first the president and the other a director of that company; and Solloway & Mills (B.C.), Ld., an associated Provincial concern.

The action was brought against these defendants by the present respondent as trustee in the bankruptcy of Theo. Frontier & Co., Ld. (hereinafter referred to as "the Frontier Co."), another brokerage company, with its headquarters at Kamloops, B.C. The plaintiff, basing his claim upon allegations which may, with sufficient particularity, be summarized as charges that the Solloway Co., with fraudulent intent, had, with the knowledge and at the instigation of the defendant directors, been guilty of acts of the description condemned in *Rothschild* v. *Brookman* (1), obtained at the trial against that company and the two individual defendants an order which had as its effect the recovery from the three of the moneys paid by the Frontier Co. to the Solloway Co. in respect of the purchase and sale of divers mining and oil shares on so-called "open"—that is to say—speculative account. In the first instance the plaintiff, as has been seen, included Solloway & Mills (B.C.), Ld., as a defendant against whom relief was claimed. At the trial, however, no case was made against that company. Since then its name has not appeared in the proceedings. The claim finally allowed was ultimately quantified at the sum of $103,666.34, with interest at 5 per cent. per annum, making a total of $118,086.44. For that sum judgment against the first three defendants was entered.

The tenor and effect of the judgment, as drawn up, was, that these defendants became jointly and severally liable to satisfy it. But that result was reached by a judicial process of reasoning not disclosed on the face of the decree. The Solloway Co. was ordered to pay or return with interest the moneys which that company had received from the Frontier Co. in respect of the open transactions between the two companies on the footing that these transactions had been avoided. The judgment for the same sum against the defendant directors was one for damages, presumably sustained by the Frontier Co. as a result of its entering into the same transactions.

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(1) 5 Bli. N. S. 165.

The question whether any order at all in respect of damages could be properly made against the defendant Solloway remains a separate issue on the present appeal.

By the Court of Appeal the judgment of the trial Court was in the result upheld against all three defendants, but M. A. Macdonald J. A. so far dissented from his colleagues there as to hold that judgment at the trial ought to have been entered against the Solloway Co. only. As against the individual defendants Solloway and Mills the action, he thought, ought to have been dismissed.

The present appeal is by the defendant Solloway alone. Neither the Solloway Co. nor the defendant Mills has sought before the Board to disturb the judgment now standing against them.

But their Lordships have not thereby been dispensed from the duty of considering whether the judgment against the Solloway Co. was justified. It is not in contest that while the appellant Solloway on grounds special to himself—one of these has already been indicated—may be entitled to have the judgment against him discharged, he can in no circumstances be properly made liable in these proceedings for any sum in excess of the amount, if any, which the Solloway Co. could therein be rightly ordered to return.

Before the Board, accordingly, Mr. Solloway as appellant was entitled to put forward any answer to the judgment appealed from, primarily open to the Solloway Co., as fully as any answer thereto open to himself separately, and he has through his learned counsel fully availed himself of that privilege and opportunity.

One of the branches of the Solloway Co. was at Vancouver. It was at that branch that the business with the Frontier Co. was transacted. The appellant Solloway, president of the Solloway Co., was at all times its principal shareholder.

The business which the Frontier Co. carried on at Kamloops was a general stock brokerage business. The company had an extensive clientele, for whom it bought and sold stock exchange securities both for cash and on open account. There was no exchange at Kamloops and the stock exchange business of the Frontier Co. had to be transacted through some inside broker or jobber on some convenient recognized exchange. This was well known to the Frontier clients, but as they could not be expected to pay to the Frontier Co. any brokerage in excess of that with which they would be charged by an inside broker acting on their direct instructions, it became a matter of necessity for that company, if its profitable business was to be substantial, to have some arrangement with such an inside broker or jobber under which in view of the extent of its business with him he would be willing to return some portion of the commission normally chargeable to clients on stock exchange transactions. The Solloway Co. with its Vancouver branch and a seat (inter alia) on the exchange there was such an inside broker, and thus there came about the relation between the two companies now to be examined.

Its nature is to be gathered from certain correspondence with the predecessor in business of the Solloway Co., a firm trading under the same name. It will suffice to refer to the following passages from two letters included in that correspondence. On April 21, 1928, the Frontier Co. wrote : " As stated in our previous letter, we still have our connection with W. F. Irwin Co., and we will retain this connection until we hear definitely from you as to what arrangements can be made with your firm." The following are passages from the Solloway firm's reply of April 25, 1928 : " We are prepared to handle your account on the terms mentioned by you—that is, we will . . . . divide commission on a fifty-fifty basis. . . . . We will deal with you on margin on the basis of 33⅓ per cent., with interest at 8 per cent. per annum on the unpaid balance. . . . . We deal only in mining and oil stocks listed on the Vancouver Stock Exchange, Calgary Stock Exchange, and The Standard Stock and Mining Exchange at Toronto. . . . . In all your orders be careful to specify ' buy ' or ' sell,' ' open order ' or ' day order ' and ' cash ' or ' open account.' We would ask you to scrutinize carefully the class of stock *your clients* will wish carried on margin. We do not wish to accept any order on this basis where the price is below 25 c. per share. We would also ask you at all times to endeavour to keep your margin no lower than one-third, and if possible request *your clients* to put up an amount in excess of that figure." The significance of the italicized references to " your clients " in this last passage will presently appear.

This proposal, accepted by the Frontier Co., was acted upon by the Solloway Co. on its incorporation at a later date. It did not preclude the Frontier Co. from transacting any of its business through other inside brokers or jobbers. It did entitle that company to the benefits stipulated for on all business actually transacted by the Solloway Co. on its instructions.

Following upon this correspondence and up to September, 1929, when the Frontier Co. became bankrupt, very many separate transactions, thousands, it seems, in number, both " cash " and " open," were in fact carried out with the Solloway Co. by the Frontier Co. on account of clients. There were also transactions—their number is not in evidence—which were actually the Frontier Co.'s own speculations. The bankruptcy of the Frontier Co. commenced on September 17, 1929. The respondent, as has already been said, is trustee in that bankruptcy. The action in which judgment has been given against the appellant was commenced by the respondent on September 17, 1930. The claim already referred to extended in the first instance to all the transactions just summarized, whether " cash " or " open " : whether closed at the date of the commencement of the Frontier bankruptcy or not. In the course of the hearing, however, the claim in respect of moneys paid to the Solloway Co. in respect of " cash " transactions ceased to be seriously pressed, and was in the result disallowed by the learned trial judge. Accordingly the judgment pronounced at the trial is confined to moneys paid on the " open " transactions, and it now becomes desirable to analyse it in some detail.

Under it the Solloway Co. and the two defendant directors have without any discrimination between them been made jointly and severally liable to the plaintiff as trustee in the

Frontier bankruptcy for a sum representing the aggregate of the sums not in the interval re-credited or repaid by the Solloway Co. which were paid *to that company* by the Frontier Co. as cover on all the "open" transactions entered into in the name of the Frontier Co. with the Solloway Co. between May 1, 1928, and the middle of September, 1929. These so-called "open" transactions had for the most part been closed, and always without delivery of shares made, called for, or, it may be assumed, ever intended. They were effected in many different securities quoted on one or other or all the stock exchanges of Vancouver, Calgary and Toronto. They were in amounts varying from ten or even fewer shares to a thousand or more. The "cash" transactions in shares between the two companies under which delivery was intended and, in every instance, in due course made, were many, although not so many as the "open" transactions. The fact that in respect of them no relief has been awarded to the plaintiff, and none is now claimed, becomes, as will be seen, one of significance, when it is remembered that in respect of voidability, if any, there was no distinction at all between these cash transactions and the open transactions.

The basis of the judgment is made clear when interpreted in the light of Mr. Fraser's argument for the plaintiff, which led to it. It may thus be summarized. The separate transactions, both open and cash, were merely the details of one entire trading in stocks between the two companies on the terms of the arrangement already stated. In the performance of its duty under that arrangement the Solloway Co. adopted a system under which as occasion arose or its convenience required, that company, to put it shortly, fraudulently resorted to some part or all of the procedure condemned in *Rothschild* v. *Brookman* (1): the use of this system, even although not proved in the case of any single individual transaction, tainted with fraud the entire performance of the comprehensive contract, and its use, being known to and presumably directed by the two defendant directors of the Solloway Co., justified the plaintiff as the trustee in bankruptcy of the Frontier Co. in his claim to avoid all the transactions and to recover from the Solloway Co. and from the individual defendant directors, in the name of damages, the amounts thereby represented.

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(1) 5 Bli. N. S. 165.

Now that case, finally accepted by the learned trial judge, so far as the open transactions were concerned, has with many submissions as to the admissibility of evidence, its sufficiency and other matters, some of them perhaps needlessly technical, been supported and attacked with the greatest elaboration by counsel on both sides.

Their Lordships do not enter into that discussion, beset as it is with much difficulty at many points. In their view the case accepted by the learned trial judge was based upon a wrong principle, so that it becomes unnecessary to canvass in detail the reasoning or the sufficiency of the findings by which he supported his conclusion. Rather has it become incumbent upon their Lordships to embark upon an inquiry, not hitherto judicially undertaken, so as, in its result, to ascertain what was the real relation in which on facts not as such in controversy the different parties stood to each other. Can support be found for the statement of the learned judge (at p. 361D of the record) on which his whole judgment is based,—namely, that on Frontier's bankruptcy, "all that remained was a right of action on the part of the trustee *for the benefit of the estate*"?

In other words, their Lordships proceed to inquire whether the plaintiff, whose sole title to sue is as trustee in the Frontier bankruptcy, has as to part of the sum adjudged any title to sue at all, and whether as to the residue of the same sum his claim does not fail for want of the evidence essential to support it. If these questions are answered adversely to the plaintiff trustee it is obvious that, without more, the present appeal must succeed, without invoking any considerations personal to the appellant.

Now the nature of the Frontier Co.'s business and the terms of its arrangement with the Solloway Co. have already in part been detailed. Apparently the Frontier Co.'s account was throughout well known to the Solloway Co. to be one mainly, if not exclusively, on behalf of clients of Frontier's, with names, in the first instance at all events, undisclosed to the Solloway Co. The reference to " your clients " in the letter of April 25, 1928, already emphasized, does not stand alone. The full commission was in the first instance paid to Solloway's on every transaction, and it was at the end of each month that half of it was returned to Frontier's. Again, exhibit 56 is a full statement, prepared by Frontier's, and in some way sent to Solloway's, detailing the participation at its date of each interested client of Frontier's in the accounts then outstanding with Solloway's. Exhibit 61 is the form in which Frontier's clients gave their instructions to them. A separate account for each client was kept in Frontier's books. Clients' orders, although in Frontier's name, were sent on to Solloway's separately as received, so as to enable the posting of their respective accounts to be made with less difficulty. Exhibit 41, as printed, consists of two specimen examples of " sold " and " bought " notes sent by Solloway's to Frontier's in cases where a client's instructions had been carried out by Frontier. The actual exhibit is composed of many of these notes, and on each of them is written, in Frontier's office, the name of the client to whom it was referable.

These bought and sold notes, in the evidence referred to as " confirmations " or " Solloway's confirmations," have bulked largely in the case. Therein, if anywhere, are to be found the actual fraudulent misstatements or misrepresentations alleged against the Solloway Co. It is accordingly convenient here to observe that no one of them was sent on to, or apparently ever seen by the Frontier client concerned in the transaction. All that he received from Frontier's was a statement of account in which the result of the transaction, whether by way of charge or discharge, is embodied (exhibit 63). In open transactions the cover was found by the client, paid into Frontier's general account, and ultimately transmitted to Solloway's by Frontier's own cheque. No default in the actual delivery of shares called for was ever made. There was no record of any complaint in respect of any of these transactions, cash or open. As to the cash transactions, they had been closed up long before action. Frontier had no interest in them one way or another, said Miss Nuyens, a very intelligent employee of the Frontier Co., called by the plaintiff. And the same may be said of the open transactions closed prior to the bankruptcy of the Frontier Co. It is nowhere suggested in the record that in respect of these any money remains unpaid to Frontier by any client. As to Solloway's, it was admitted by Mr. Fraser (at p. 295 of the record) that up to October, 1929—a month after Frontier's bankruptcy—Solloway's had ex facie fulfilled all their mandates, an admission which has to be taken in conjunction with this further fact that no evidence was adduced to show that the client, or the Frontier Co. itself, had in any instance suffered any loss or damage at all by the fulfilment of any mandate otherwise than as represented by the Solloway confirmation, if in fact such was the case. It is on such facts—there are many others similar in tendency to be found in the record—that the question must be answered whether, as trustee in bankruptcy of Frontier, and in that character alone, the plaintiff has any title at all to maintain the action or hold the judgment as against the appellant.

Now, first, in all these closed transactions, whether originally open or cash, excepting for the moment only those which may have been Frontier's own speculations, it is, their Lordships think, manifest that the Frontier Co.'s interest, whatever it originally may have been, had at the commencement of its bankruptcy ceased; or that if any scintilla of interest then remained, it was that of a bare trustee which did not pass to the plaintiff as trustee in its bankruptcy.

Be it observed that in this matter there is no difference in principle, quoad the plaintiff, between closed cash transactions and closed open transactions. The plaintiff did not in the first instance discriminate between the two, and the only reason why the trial judge did not extend his decree to the moneys paid on any closed cash transaction seems to have been that those moneys would be balanced by the scrip which, as a condition of any order declaring such a transaction void, would have to be returned to the defendant company. Let the plaintiff's position at this point, then, be viewed by reference both to the closed open transactions and to the closed cash transactions, in which, as Miss Nuyens agreed, Frontier's retained no interest one way or another: and let this test be put in the form of three questions: (1.) What right or title had Frontier's trustee in bankruptcy to avoid *of his own motion* any of these transactions? (2.) What right or title had he to recover for the benefit of Frontier's creditors moneys paid in respect of them by Frontier's clients? (3.) What right or title had he to demand back from any client of Frontier's the shares received by that client on completion of his cash contracts?

These questions other than the last may be asked with as much pertinence in relation to the *closed* " open " transactions as to the *closed* " cash " transactions, and to all three it appears to their Lordships that only one answer is justified—an answer which discloses the fact that possibly, as to the whole, certainly as to the preponderant part of the sums included in the judgment, the plaintiff as trustee in bankruptcy has no right or title to them at all.

But this matter may equally well be approached from another angle. In what relation, it may be asked, did the Frontier Co. stand to each one of these transactions entered into by it with Solloway's on the instructions of a client? The answer made on indisputable authority must surely be that while the Frontier Co. may have been personally liable to the Solloway Co. on the contract, it was at the same time merely an agent for an undisclosed principal, the client. The trial judge apparently treated this possible position as being negatived by the facts that the cover provided by the client passed through Frontier's general account before being paid over by Frontier to Solloway's, and that in Solloway's hands the money could no longer be earmarked as the money of any client. Then, by what seems to be a complete non sequitur, the learned judge, using the words already quoted from his judgment, treated this last fact as a justification for the plaintiff being allowed to recover the moneys for

Frontier's general estate. A reference, however, to the judgment of Vaughan Williams L.J. in *King* v. *Hutton* (1) will show how small in the circumstances is this fact to which the learned judge attached final importance. The truth is that these considerations of his are hardly relevant to the question. The conclusion that in each transaction the client was the undisclosed principal is reached by reference to such facts as have here already been detailed, facts which show that there are absent from this case the only circumstances which caused any difficulty in reaching that conclusion in *Beckhuson & Gibbs* v. *Hamblet* (2); *Anderson & Co.* v. *Beard* (3); *Scott & Horton* v. *Godfrey* (4) (see particularly pp. 733, 734, 737, 738, 739 of the report). The difference of opinion between Bigham J. in the last case and Kennedy J. in the first does not, in view of Miss Nuyens's evidence, here arise.

But in this case it seems unnecessary to go further than this statement of Collins L.J. in *Levitt* v. *Hamblet* (5): "With regard to the question of whether privity can be created between a jobber and the client of the broker who gives the order, clearly at common law such privity would be raised."

Accordingly it is hardly possible to support the judgment of the trial judge for the figure contained in it. With its bankruptcy all authority of the Frontier Co. as agent came to an end, and in relation to any question arising out of any transaction—certainly any closed transaction—the two contracting parties, Frontier Co.'s client and the Solloway Co., thereafter stood face to face. And be it observed that this difficulty is in no way met by conceding to Frontier's clients a right of proof in the bankruptcy in respect of any money of theirs paid to the trustee under the judgment. These clients have no more claim against Frontier's general assets in respect of these moneys than have Frontier's general creditors any right to participate in them. In the same way these moneys when recovered can never properly become general assets in the bankruptcy. They would constitute a separate trust fund for the benefit of Frontier's different clients, who in the first instance provided them. All of which is another way of saying that even if they might have been recoverable by the Frontier Co. before its bankruptcy no title to sue for them ever vested in the plaintiff as trustee in that bankruptcy.

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(1) [1900] 2 Q. B. 504, 507.
(2) [1900] 2 Q. B. 18, 23, 24.
(3) [1900] 2 Q. B. 260.
(4) [1901] 2 K. B. 726.
(5) [1901] 2 K. B. 53, 63.

But even if the decree cannot be supported in its entirety, the question remains whether it may not be supported for some less figure ? It may be said, and possibly quite truly, that the present figure represents (inter alia) moneys provided by the Frontier Co. itself, recoverable on cause shown by the plaintiff as trustee in its bankruptcy. Even so, however, no case has been proved or attempted to be proved by the plaintiff justifying a decree for even such sums could their respective amounts be ascertained.

The truth is that the plaintiff here stakes everything in the risky adventure of endeavouring in one proceeding to secure the benefit of *Rothschild* v. *Brookman* (1) in its application to a multitude of separate contracts and that without tendering any evidence at all that in the case of any one of these contracts Solloway's had been guilty of the conduct condemned in that case.

The complete lack of proof from this point of view is striking. There is, for instance, no evidence at all as to any transaction prior to November, 1928 : no documents from Solloway's Vancouver office before that month were in evidence, and yet payments made in respect of the previous open transactions are all included in the decree, and amount at the least to $7842.99. In fact, the plaintiff, for lack of evidence that any one of the impugned transactions was within the mischief of *Rothschild* v. *Brookman*( 1), sought to rely for judgment merely on an attempted proof of a general system. He forgot that a *Rothschild* v. *Brookman* (1) decree is only obtainable on proof that in carrying out the particular transaction the defendant was guilty of the conduct there condemned. Nothing of this kind has in fact been shown.

(1) 5 Bli. N. S. 165.

It is a most striking circumstance that the only individual contracts to which attention was directed, of course, at the instance of the defendants, were contracts free, in their carrying out, of all offence whatever.

So far their Lordships have been dealing with the case as it affects indifferently both the defendant company and the appellant. But the actual liability of the appellant is a thing distinct and apart from that of the company, and the judgment, even if well founded as against the company, may be incapable of support as against him. It will not, however, be necessary now to do more than indicate these separate difficulties which stand in the way of the judgment as affecting the appellant :—

1. While as against the company a *Rothschild* v. *Brookman* decree " may be made without proof of loss or of fraud " (see that case (1), also *Parker* v. *McKenna* (2)), there is no liability for damages upon the appellant as a director unless as against him both are proved.

2. It may be agreed that in a case under " the system " in a transaction where fraud has in fact been established against his company, fraud may, readily enough, be imputed to a director (especially if, as in this case, he gives no evidence) on proof that he was cognizant or responsible for the system and that even although the working of the system is not necessarily fraudulent.

3. But even in such a case the remedy against the director is not the same as that against the company. This *Rothschild* v. *Brookman* (1) claim that the transaction is void is in this respect closely analogous to an action for rescission against a company and its directors based on a fraudulent prospectus. There the company is ordered to return all the moneys paid under the contract rescinded. No such order, however, can be made against the directors either separately or jointly. This point is concluded by Lord Cairns' judgment in *Ross* v. *Estates Investment Co.* (3) His words are now transcribed for convenience of reference : " But it seems that, probably

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(1) 5 Bli. N. S. 165, 189.
(2) (1874) L. R. 10 Ch. 96, 107.
(3) (1868) L. R. 3 Ch. 682, 689, 690.

per incuriam, the decree has ordered that Mr. Sarl [the defendant director implicated in the fraud] shall not only pay the costs of the suit, that is to say, be jointly and severally liable for the costs of the suit, which I think is quite right, but further, that he shall be jointly and severally liable for the repayment of the 10*l.* which was paid as a deposit for the plaintiff's shares. That money was not paid directly to him, nor was he in any way the custodian of it. That direction must have crept into the decree by an oversight, and it ought now to be varied." In other words, the decree now appealed from cannot in its present form, on that ground alone, as against Solloway, be supported.

4. Nor is it on this point to be justified by reference to *Barnes* v. *Addy*. (1) That case is doubtless an authority for the existence of some liability on the part of a director in the position of the appellant, against whose company a *Rothschild* v. *Brookman* (2) decree based upon fraud has been properly made. But it supplies no measure of the extent of such a liability. The order in *Barnes* v. *Addy* (1) was to restore a trust fund which had been wrongfully paid away by the joint act of the trustee and the defendant, his solicitor. There the liability was clearly joint and several in respect of the only relief given. It is quite otherwise in this case.

For, as has already been pointed out, no loss or damage attributable to the fraud is here proved: no benefit from any proved fraud is shown to have accrued to the appellant. In these circumstances it would appear that no order beyond one for costs could properly be made against him: see *Ross* v. *Estates Investment Co.* (3) Adopting, however, the suggestion of Lindley M.R. in *Frankenburg* v. *Great Horseless Carriage Co.* (4) it is just conceivable that the appellant might ultimately have to answer in some damages in the event of the defendant company failing to meet a valid judgment against it. The observation of the Master of the Rolls, however, in that case was made on an interlocutory application to strike out a director as defendant in an action for rescission brought against his company and himself. It was not made at the trial, and their Lordships' attention has not been drawn to any succeeding English authority in which such a judgment as there contemplated has ever in fact been pronounced. But assuming that a decree for such damages may at some time be given against the appellant, the time for it has not yet arrived. And for what amount would it be ? For no more, it would seem, than a nominal sum in the absence of proof of any damage to the plaintiff from any established fraud of the defendant company or of any benefit to the appellant accruing therefrom. In other words, damage resulting to the Frontier estate from the appellant's fraud is, as distinct from the claim against the Solloway Co., the gist of the cause of action against him. And no such damage has been proved.

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(1) (1874) L. R. 9 Ch. 244.

(2) 5 Bli. N. S. 165.

(3) (1868) L. R. 3 Ch. 682, 689, 690.

(4) [1900] 1 Q. B. 504.

But their Lordships need not further pursue this subject. For reasons already given the judgment appealed from cannot, as against the appellant, be allowed to stand. On that footing it is superfluous to consider the modifications which for other reasons would, so far as he is concerned, have to be made in it. If the judgment is to be *supported* as against him it must be proof against *all* attack.

*Rothschild* v. *Brookman* (1), pace Lord Bramwell in *Waddell* v. *Blockey* (2), is good equity. Nothing here said will weaken its effect. But neither *Rothschild* v. *Brookman* (1), nor any finding of the learned judge, justifies in the absence of such evidence as that to which their Lordships have referred the judgment pronounced against the appellant.

Their Lordships will accordingly humbly advise His Majesty that the judgment appealed from be set aside so far as it affects the appellant. The respondent must pay to the appellant his costs in both the Provincial Courts as well as of this appeal.

Solicitors for appellant : *Gard, Lyell & Co.*
Solicitors for respondent : *White & Leonard.*

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(1) 5 Bli. N. S. 165.

(1) (1879) 4 Q. B. D. 678, 680.

[HOUSE OF LORDS.]

SMITH . . . . . . . . . . . . . . . APPELLANT;

AND

OWNERS OF THE STEAMSHIP "ZIGURDS" AND HER FREIGHT, AND E. A. CASPER, EDGAR AND COMPANY, LIMITED (INTERVENERS) RESPONDENTS.

H. L. (E.)*
1933
Dec. 14.

*Shipping—Assignment of freight—Ship's agents—Notice of Assignment—Sufficiency of notice—Priority.*

Among the claimants to a fund in Court, representing the proceeds of a sale of a foreign vessel and her freight, were a mortgagee of the ship and a firm of ship brokers who acted as the ship's agents and made advances on behalf of the ship. Both claimants relied upon documents which were admitted to be good equitable assignments of the freight. The mortgagee's assignment was prior in time. The ship's agents relied upon a letter dated March 2, 1931, and signed by the master of the ship with the consent and approval of her managing owner. Having received this letter, the ship's agents on March 5, 1931, wrote to the receivers of cargo: "S.S. *Zigurds*. We beg to give you notice that we hold captain's authority to collect the freight per this steamer's cargo, against which we have made payments." The mortgagee had given no notice of his assignment.

In an action brought by the mortgagee against the owners claiming possession of the ship and her freight under his mortgage, the ship's agents intervened to claim against the freight as assignees relying on their assignment, and on the letter of March 5, 1931, as being notice thereof:—

*Held*, that in the circumstances the letter was a good and sufficient notice of the assignment.

Order of the Court of Appeal [1933] P. 87, reversing the order of Langton J. [1932] P. 113, affirmed.

APPEAL from an order of the Court of Appeal. (1)

The appellant was the mortgagee of the steamship *Zigurds* under a statutory mortgage dated April 30, 1929, and a supplementary agreement of even date, which was admitted to constitute an equitable assignment of her freight. He brought an action claiming possession of the ship and her freight as mortgagee. The writ was issued on March 17, 1931, and amended on March 27, 1931. On March 28, 1931, the respondents, a firm of ship brokers, issued a writ claiming against the ship and her freight for necessaries supplied to the ship and against her cargo and freight as assignee thereof. On March 30, 1931, a sum of 1837*l.* 4*s.* 10*d.* was paid into Court on account of freight and demurrage under some proceeding against the ship, particulars of which were not given.

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* *Present:* LORD ATKIN, LORD TOMLIN, and LORD RUSSELL OF KILLOWEN.

(1) [1933] P. 87.

No appearance was entered by the owners in the mortgagee's action, and on June 15, 1931, Langton J. pronounced for the validity of the mortgage and condemned the *Zigurds* and her freight and the proceeds of the sale of the ship in the amount of the principal and interest due on the mortgage, subject to any right which the ship brokers might have.

The ship brokers' claim arose in these circumstances: On the vessel's arrival at the port of West Hartlepool with a cargo of timber, her managing owner called upon the ship brokers, who had been invited to act as agents for the ship. As this involved making advances to a substantial amount, the ship brokers declined to act unless they were fully protected. A letter was then signed by the master of the ship and handed to them. It was dated March 2, 1931, and was in these terms: "E. A. Casper, Edgar & Co., Limited, Ship Brokers—Dear Sirs, Please pay the freight for my vessel the *Zigurds* and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar & Co., Ld., and oblige, Yours faithfully, (s.) F. Krauklis, Master."

This letter was admitted to be a good equitable assignment of the freight.

Having received this letter the ship's agents on March 5, 1931, wrote to Messrs. Churchill & Sim, the receivers of cargo, as follows:

"Dear Sirs—S.S. *Zigurds*—We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments. Yours faithfully, for E. A. Casper, Edgar & Co., Ld. (s.) D. Edgar, Director."

The ship's agents made the necessary advances on the ship's account. They relied on the letter of March 5 as being a good and sufficient notice of their assignment. The mortgagee had given no notice of his assignment. There was due to him under his mortgage a sum of 5435*l.*

On a motion to determine priorities among the claimants Langton J. held (1) that the letter of March 5, 1931, was not a sufficient notice of assignment. The ship's agents appealed, and the Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) reversed the order of Langton J. (1), and made an order that out of the sum in Court the ship's agents were entitled to be paid the sum of 877*l.* 4*s.* 9*d.* in priority to the mortgagee. (2)

The mortgagee appealed to this House.

*Sir Gerald Hurst K.C.* and *H. Atkins* for the appellant.

*W. P. Spens K.C.* and *J. V. Naisby* were present on behalf of the respondents, but were not called on.

LORD ATKIN. My Lords, in this case the question that arises before the House is a question as to the priority of equitable assignments. It arises in respect of a ship called the *Zigurds*, which in 1929 was sold to a Latvian firm, and in respect of the purchase of which the appellant made an advance of the purchase price or towards the purchase price for which he took a statutory mortgage on the ship. At the same time he took an agreement in writing which is alleged to be an equitable assignment of the freight of future voyages, and in respect of that matter, for the purposes of this case, it is to be assumed that that document did in fact give him an equitable assignment of the freight. In 1931 the ship was at West Hartlepool in February with a cargo of timber, and the respondents E. A. Casper, Edgar & Co., Ld., were appointed the ship's agents. They appear to have known of the financial position of the ship at that time, which certainly was not a very satisfactory one; there were defaults on the mortgage and there were claims in respect of other matters which it is unnecessary to deal with. The respondents were unwilling to undertake the duty of agents of the ship at

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(1) [1932] P. 113.

(2) [1933] P. 87.

West Hartlepool, in so far as it involved making disbursements on the ship's behalf, unless they got security over the freight. The ship's master having authority, which is not disputed, to make such arrangements did arrange with the respondents that they should have that security, and he gave the agents a document on March 2, 1931, which is said to be in a printed form such as is taken by all ship's agents of foreign ships, and perhaps of British ships as well, entitling them to receive the freight. The document is on the ship's broker's paper—and says: "Dear Sirs, Please pay the freight for my vessel the *Zigurds* and all demurrage which may be payable under the charter to my agents, Messrs. E. A. Casper, Edgar & Co., Ld., and oblige, Yours faithfully, F. Krauklis, Master." It will be noticed that is not in itself in terms an authority to the agents to receive the freight, but it purports to be a notice to the freight payers to pay to the agents, though no doubt it comes to the same thing. The question might possibly have arisen whether that document in ordinary form in ordinary circumstances would amount to an equitable assignment of the freight, and the authority of a judge having great weight in these matters—the late Bailhache J.—was produced, which appears to be a decision that it would not. (1) As far as that matter is concerned, I merely desire to say that it must be left open, because it is not necessary for the decision of this case.

My Lords, in the facts of this particular case it is now not disputed that there was in fact an equitable assignment constituted by the intention of both parties—that this authority should in fact represent an equitable assignment to the agents of the freight, giving them a charge over the freight, as against the disbursements they might make on the ship's behalf. Therefore for the purposes of this case there must be taken to be two equitable assignments—(1.) that given in 1929 to the appellant, and (2.) that given in 1931 to the respondents. The question then arises as to the priority of these two equitable assignments, and it is not disputed that that priority would depend upon the date at

(1) *Harper* v. *Bland & Co.* (1914) 20 Com. Cas. 143.

which notice of the equitable assignment was in fact given to the debtor. Now no notice was given of the appellant's equitable assignment at all, and therefore the question remains whether or not the respondents did in fact give notice of their equitable assignment. The notice that they gave was this: On March 5, 1931, they wrote to Messrs. Churchill & Sim, who are a very well known firm who deal in timber at this port and many other ports, in these terms: "Messrs. Churchill & Sim, London, Dear Sirs, S.S. *Zigurds*—We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments. Yours faithfully, for E. A. Casper, Edgar & Co, Ld., D. Edgar, Director." The question is whether that is a notice to Messrs. Churchill & Sim that the respondents did hold an equitable assignment or charge on the freight to which they would have to give effect.

My Lords, it appears to me that there is only one possible construction of that document. I think it was given for the purpose of making it plain to Messrs. Churchill & Sim that the ship's agents did in fact hold a charge upon the freight and that they had made disbursements by virtue of that charge—" against which we have made payments." On the other hand, I think there can be no doubt at all that any reasonable firm of business people, used to this kind of business, would understand that that letter was given to them for the express purpose of letting it be made known to them that there was in fact held by the brokers an equitable charge over this freight and they, Churchill & Sim, must not pay to anybody else. My Lords, if that was the result of that communication, it appears to me to have been a perfectly effective notice of an equitable charge. It is suggested that it is not that at all but that it was merely a notice of an ordinary authority to collect freight, in pursuance of which the brokers might, if so disposed, make advances for which they would have, if they did collect freight, a lien.

My Lords, I have already said I must not be supposed to assent to the proposition that that is the only effect of an authority given in ordinary circumstances by the master of a foreign ship, but whether that be so or not in the case of an ordinary notice, it appears to me quite plain that these words "against which we have made payments" convey to the recipients that here there was an equitable charge in respect of which they must govern their conduct accordingly.

My Lords, for these reasons it seems to me that the decision given by the Court of Appeal is quite correct and cannot be challenged. I therefore move your Lordships that this appeal should be dismissed with costs.

LORD TOMLIN. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

*Order appealed from affirmed, and appeal dismissed with costs.*

*Lords' Journals*, Dec. 14, 1933.

Solicitors for appellant: *Constant & Constant.*

Solicitors for respondents: *Middleton, Lewis & Clarke, for Middleton & Co., West Hartlepool.*

[HOUSE OF LORDS.]

NEUMANN . . . . . . . APPELLANT;

AND

THE COMMISSIONERS OF INLAND REVENUE, ET E CONTRA . . . RESPONDENTS.

H. L. (E.)*
1934
*Feb.* 1.

*Revenue—Income Tax—Surtax—Company—Assessment under Schedule A—Profits exceeding assessed value—Distribution of profits among Shareholders—Surtax on distributed sum—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, c. 40), *All Schedules Rules, Rule* 20—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, c. 10), *s.* 38, *sub-s.* 2; *s.* 39, *sub-s.* 2—*Finance Act,* 1931 (21 *&* 22 *Geo.* 5, c. 28), *s.* 7, *sub-s.* 1.

A Company owning real property in the City of London was assessed to income tax under Sch. A. The profits of the Company largely exceeded the amount at which it was assessed and on which it paid income tax. Out of a surplus of rents received over and above the amount of income tax paid, the Company on April 4, 1930, distributed a dividend amounting in the case of one shareholder to the sum of 4275*l.*

*Held*, that by virtue of r. 20 of the General Rules applicable to Schs. A, B, C, D and E in the Income Tax Act, 1918, and of s. 38, sub-s. 2, and s. 39, sub-s. 2, of the Income Tax Act, 1927, the shareholder was obliged to include this sum in his return for the purpose of an assessment to surtax as being part of his income tax income, although free from tax under Sch. D.

APPEAL from an order of the Court of Appeal reversing an order of Finlay J. made upon a special case stated by the Commissioners for the special purposes of the Income Tax Acts under s. 42, sub-s. 7, of the Finance Act, 1927, and s. 149 of the Income Tax Act, 1918. The following is a summary of the facts stated in the special case.

The appellant was a shareholder in the Salisbury House Estate, Ld., hereinafter called the Company. The Company owned real property in the City of London, the rents from which greatly exceeded the amount on which the Company was assessed to income tax under Sch. A. It had been contended on behalf of the Crown that the Company was carrying on a trade, and that in computing its profits for the purpose of an assessment under Sch. D, it was necessary to take into account all its receipts, including receipts from rents, and assessments were made upon this basis. The Company appealed against these assessments, and ultimately it was held by the House of Lords in *Fry* v. *Salisbury House Estate, Ld.* (1) that the rents were profits arising from the ownership of lands in respect of which the assessment under Sch. A was exhaustive and that consequently they could not be included in an assessment under Sch. D.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, and LORD WRIGHT.

Pending the said litigation the Company had put aside a sum of 18,325*l.* out of its profits to the credit of an income tax reserve ; but after the decision of the House of Lords the Company out of the said sum of 18,325*l.* declared an interim dividend of 5 per cent., free of tax, on account of the year ending on December 25, 1930, and sent to the appellant a cheque for 4275*l.* with a letter informing him that the sum was in respect of an interim dividend of 5 per cent., free of tax, on the shares registered in his name, and that it was equivalent to a gross amount of 5343*l.* 15*s.*

The appellant included this sum of 5343*l.* 15*s.* in his return for the purpose of assessment to surtax for 1929–1930. Afterwards, in consequence of the decision of Rowlatt J. in *Gimson* v. *Inland Revenue Commissioners* (2), the Company informed the appellant that they had erroneously described the sum of 4275*l.* as a dividend of 5 per cent., free of tax, and that in fact it represented a sum distributed out of untaxed income of the Company and ought not to have been included in any surtax return. Thereupon, on October 1, 1930, the appellant wrote to the clerk to the Special Commissioners informing them that the Company were communicating with the Board of Inland Revenue on the matter of the 4275*l.* and that in the meantime he gave notice of appeal against the assessment to surtax.

At the hearing before the Special Commissioners the Commissioners of Inland Revenue contended that the 4275*l.* represented for taxing purposes a gross sum of 5343*l.* 15*s.* assessable to surtax. The appellant contended that he was not assessable to surtax either in the amount of 5343*l.*15*s.* or in any less sum, or at all. The Special Commissioners determined the appeal in favour of the Commissioners of Inland Revenue and held that the dividend formed part of the appellant's total income for the purposes of surtax for the year 1929–1930 and confirmed the assessment in the sum of 5343*l.* 15*s.*

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(1) [1930] A. C. 432.

(2) [1930] 2 K. B. 246.

The special case was heard before Finlay J., who held that the distribution was not made out of profits and gains which were charged to tax and that therefore the Company, not having borne the burden of any tax, could not pass on any such burden to its shareholders and that, as the sum in question was not liable to income tax, it could not be liable to surtax.

The Commissioners of Inland Revenue appealed. The Court of Appeal (Lord Hanworth M.R., and Slesser and Romer L.JJ.) allowed the appeal and ordered that the sum of 4275*l.* should be included in the assessment to surtax in place of the sum of 5343*l.* 15*s.*

The appellant appealed to this House. There was a cross-appeal by the Commissioners of Inland Revenue who insisted that the sum of 5343*l.* should be included instead of the sum of 4275*l.*

1933. Nov. 14. *A. M. Latter K.C.*, *Wilfrid Greene K.C.* and *J. H. Bowe* for the appellant. A dividend paid by a company and received by a shareholder is not, merely as such, liable to income tax. Consequently it is not liable to surtax, which is "assessed, charged, collected and paid as a deferred instalment of income tax": Finance Act, 1927, s. 38, sub-s. 1 (*b*). (1) By r. 20 of the General Rules in the Income Tax Act, 1918 (1), a company is taxable upon its

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(1) Finance Tax Act, 1927, s. 38, sub-s. 1: "Income Tax for the year 1928–29 and every subsequent year shall, instead of being charged at a single rate, be charged at a standard rate and, in the case of an individual whose total income from all sources exceeds a stated amount, at a rate or rates exceeding the standard rate in respect of any part or parts of his income in excess of that amount, and where income tax is so charged for any year the following provisions shall have effect, subject to the other provisions of this part of this Act— . . . .

(*b*) Where the amount of income tax payable by an individual for that year in respect of his total income is greater than the amount which would profits and gains computed in accordance with that Act on the full amount of those profits and gains before any dividend thereof is made; and the company paying the dividend "shall be entitled to deduct the tax appropriate thereto." But the company does not account to the Revenue for the amount it deducts, and the deduction in each case is only made for the purpose of being added back to the amount each shareholder receives, in order to show his total taxable income from all sources and so enable him to claim any deduction to which he is entitled and enable the Revenue Officers to assess him to any surtax to which he may be subject.

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have been payable by him in respect thereof if income tax had been chargeable at the standard rate only, the difference between those two amounts (in this Part of this Act referred to as 'surtax') shall be computed, assessed, charged, collected and paid as a deferred instalment of income tax according to the provisions of this Part of this Act relating to surtax" . . . .

Sub-s. 2: "The expression 'total income' in relation to any person means the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax."

By r. 20 of the General Rules applicable to Schedules A, B, C, D and E under the Income Tax Act, 1918, "The profits or gains to be charged on any body of persons"—including "company": see s. 237 of the Act of 1918—"shall be computed . . . . on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

Finance Act, 1927, s. 39, sub-s. 1, "Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due, or that there may be deducted from any dividend the tax appropriate thereto, or that a proportionate deduction of the tax charged shall be allowed by any person out of any produce or value payable to him, shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due . . . . "

By sub-s. 2, "In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions

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By the Finance Act, 1927, s. 38, sub-s. 1, income tax for the year 1928–1929 and every subsequent year shall, instead of being charged at a single rate, be charged at a standard rate. Therefore surtax is chargeable only in respect of dividends from which the company may deduct income tax at the standard rate. The sum of 18,325*l.*, out of which the sum of 4275*l.*, or the sum of 5343*l.* 15*s.*, was paid, was not a sum from which the Company could deduct income tax at the standard rate or at any other rate. It was an accumulation of rents exempt from income tax in accordance with the decision of this House in *Fry* v. *Salisbury House Estate, Ld.* (1) It has long been established that the dividend in the hands of the shareholder is not again taxable as a new subject matter of taxation: *Attorney-General* v. *Ashton Gas Co.* (2), approved in this House in *Ashton Gas Co.* v. *Attorney-General* (3); *Purdie* v. *The King* (4); *Inland Revenue Commissioners* v. *Blott* (5); *Bradbury* v. *English Sewing Cotton Co.* (6); *Gimson* v. *Inland Revenue Commissioners* (7); Income Tax Act, 1918, s. 100, sub-s. 3. It follows that neither

in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year."

Finance Act, 1931, s. 7, sub-s. 1, "The provisions of r. 20 of the General Rules, which authorize the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period."

Sub-s. 2, ". . . . A dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-s. 1 of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorized by the provisions of the said r. 20, be equal to the net amount received . . . ."

(1) [1930] A. C. 432.
(2) [1904] 2 Ch. 621, 623.
(3) [1906] A. C. 10, 13, 14.
(4) [1914] 3 K. B. 112.
(5) [1920] 1 K. B. 114, 130–133.
(6) [1923] A. C. 744, 752.
(7) [1930] 2 K. B. 246.

5343*l.* 15*s.* nor 4275*l.* is chargeable to income tax or surtax, and the appeal should be allowed.

Nov. 16. *Sir Thomas Inskip A.-G.*, *Sir D. B. Somervell S.-G.* and *Reginald Hills* for the respondents. By s. 7, sub-s. 1, of the Finance Act, 1931, " The provisions of r. 20 of the General Rules, which authorize the deduction of the appropriate tax from any dividend paid by " a company " shall . . . . be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the " company " which have been charged to tax " . . . . The sum of 18,325*l.* forms part of the profits and gains of the Company which have been charged to tax, namely under Sch. A. By s. 38, sub-s. 1, of the Finance Act, 1927, income tax shall, instead of being charged at a single rate, be charged at a standard rate. Therefore the Company was entitled to deduct income tax at the standard rate from this sum of 18,325*l.*, and the dividend, whatever its proper amount, is part of the total income of the appellant chargeable to surtax.

Then, upon the cross-appeal, the proper amount of dividend to be returned is 5343*l.* 15*s.* By s. 7, sub-s. 2, of the Finance Act, 1931, a dividend paid by a company shall to the extent to which it is paid out of profits and gains of the company which have been charged to tax, be deemed to represent income of such an amount as would, after the deduction of tax authorized by r. 20, be equal to the net amount received. The sum which after deducting tax at 4*s.* in the pound would be equal to 4275*l.*, the net amount received, is 5343*l.* 15*s.*

Nov. 22. *A. M. Latter K.C.* for the respondent in the cross-appeal.

Sect. 7, sub-s. 2, of the Finance Act, 1931, has no application where the company has in fact made no deduction from the gross amount of the dividend, so that there is no net dividend received. The amount received by the shareholder in the present case was a gross sum. To consider it as a net sum is to charge the Company with more profits and gains than it ever received.

Nov. 23. The House took time for consideration.

1934. Feb. 1. LORD TOMLIN. My Lords, this appeal and cross-appeal arise out of an assessment to surtax for year 1929–30 made upon the appellant by the Commissioners for the special purposes of the Income Tax Acts.

The facts can be stated shortly. A company called the Salisbury House Estate, Ld., owned and managed a block of buildings in the city of London containing numerous rooms, let unfurnished as offices to many tenants. The Company for appropriate considerations provided for the tenants who required them services in connection with the cleaning and the heating of the rooms.

For the four years ending April 5, 1925, 1926, 1927 and 1928, the Company were assessed under Sch. A to income tax on the gross value of the building as appearing on the valuation list under the Metropolis (Valuation) Act, 1869.

In regard to the profits and gains derived from the services rendered to the tenants the Company admitted liability to be assessed to income tax under Sch. D, but the Crown claimed that in making the assessment under Sch. D the rents, which far exceeded the annual value as assessed under Sch. A, must be included, allowance being made for tax assessed under Sch. A.

The matter came on appeal before your Lordships House and on April 4, 1930, your Lordships held (see *Fry* v. *Salisbury House Estate, Ld.* (1)), that the rents were profits arising from the ownership of land in respect of which the assessment under Sch. A was exhaustive and that such rents therefore could not be included in the assessment under Sch. D as trade receipts of the Company.

Pending that appeal to your Lordships House the Company distributed in dividend (from which the appropriate amounts for income tax were deducted), sums equal to their profits in respect of services assessable under Sch. D and also sums equal to the amounts of the assessments made under Sch. A.

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(1) [1930] A. C. 432.

The Company however set aside the sum of 18,325*l.* (representing the amount by which their net rents exceeded the amounts of the assessments under Sch. A) to the credit of an income tax reserve account to meet such liability, if any, as might be established against them in the litigation then pending.

On April 4, 1930, immediately after the decision of your Lordships' House was announced, the Company distributed the sum of 18,325*l.* so set aside among their shareholders by way of dividend. The appellant, who held 85,500 shares of 1*l.* each in the Company, received from the Company a cheque for 4275*l.*, together with a letter from the Company, dated April 4, 1930, informing him that the sum of 4275*l.* was in respect of an interim dividend of 5 per cent., free of tax, on the shares registered in his name and that it was equivalent to a gross amount of 5343*l.* 15*s.*

Later, the appellant was informed by the Company that the sum of 4275*l.* had been erroneously described by the Company as a dividend of 5 per cent., free of tax, and that in fact it represented a sum distributed out of the untaxed income of the Company which should not have been included in any surtax return made by the appellant, Nevertheless, the Commissioners for the Special Purposes of the Income Tax Acts in making upon the appellant an assessment to surtax for the year 1929–30, included the sum of 5343*l.* 15*s.* as being the gross amount applicable to a net dividend of 4275*l.* Finlay J. held, that in respect of the dividend in question nothing at all ought to have been included in the assessment, and the Court of Appeal have held that the sum of 4275*l.*, and not the sum of 5343*l.* 15*s.*, ought to have been so included.

The case is a difficult one, and the difficulty in part arises from the fact that the amendments from time to time made to the Income Tax Acts, directed as they frequently are to stopping an exit through the net of taxation freshly disclosed, are too often framed without sufficient regard to the basic scheme upon which the Acts originally rested.

The relative positions of a company and the shareholders of the company in relation to income tax, under the Income

Tax Acts have always been recognized as special in character. It was never, I think, doubted that under the Act of 1842 the profits of a business carried on by a company were taxable against the company under Sch. D, and were not taxable again after distribution in the hands of the shareholders under Sch. D or any other Schedule. At the same time it was permissible to the company under s. 54 of the Act of 1842 to deduct from the dividend the proportionate part of the tax paid to the tax collector, and the shareholders entitled to exemption from or abatement of income tax could upon the footing of the deduction obtain the necessary return of tax. I cannot but think that the position under the Act of 1842 upon its proper construction is correctly described in the following passage from the speech of Lord Phillimore in *Bradbury* v. *English Sewing Cotton Co.* (1) :—

"A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sch. D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon.

"If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Sch. D, the money received by him in dividends.

"Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently, proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the statute; it is founded upon the provisions of the statute itself; and the statute carries the

(1) [1923] A. C. 744, 769.

analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is exempt from income tax or pays at a lower rate, can get the income tax which has been deducted on the dividend warrant returned to him."

In practice the matter did not work out quite so simply. It has to be remembered that the amount distributable in dividend in any year might, in view of the assessment of profits or gains under Sch. D being upon the basis of the average of the three preceding years as it then was, be much more or much less than the amount of the assessment for that year, so that, if this proportionate deduction was treated as meaning the rateable proportion of the tax paid by the Company in respect of the year of distribution, it might much exceed or be much less than the amount which would be deducted from the dividend if the current rate of tax in respect of the gross dividend had been deducted. At any rate a practice seems to have grown up of companies deducting from dividends tax appropriate to the amount of the dividend at the current rate of tax quite irrespective of the amount of tax paid by the company to the Revenue, and of the shareholders claiming exemption or abatement being treated by the Revenue as having paid tax to the extent of that deduction.

As the company making the deduction lay under no obligation to pay to the Revenue anything more than the tax based upon its own assessment, the result was that the tax returned to those claiming exemption or abatement could rarely, if ever, have had any exact relation to the amount of tax received by the Revenue from the recipient of returned tax.

When supertax was imposed in 1910 the return of total income (that is what may be called total income tax income) made for the purpose of obtaining exemption or abatement became also the basis of the assessment to supertax and therefore of increased importance, and the Revenue then seem to have stood to gain on the whole to a greater extent by the continuance of the system which I have described.

In fact when the Act of 1918 was passed a change was made in the language which I think gave effect to the practice.

Rule 20 of the General Rules applicable to Schedules A, B, C, D and E took the place of s. 54 of the Act of 1842, and is in the following terms :—

" 20. The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

Under s. 237 of the Act of 1918 unless the context otherwise requires :—

" Body of persons " means any body politic, corporate, or collegiate, and any company, fraternity, fellowship and society of persons, whether corporate or not corporate.

By s. 33 of the Finance Act, 1924, a company is required on every dividend warrant or statement annexed thereto to show :—

(*a*) the gross amount of the dividend which after deduction of the income tax appropriate thereto corresponds to the net amount actually paid ;

(*b*) the rate and the amount of income tax appropriate to such gross amount ; and

(*c*) the net amount actually paid.

As the result of the Finance Act, 1927, surtax in and from the year 1929–30 took the place of supertax, and for the year 1928–29, and every subsequent year, income tax became chargeable at a standard rate instead of at a single rate.

Sect. 38, sub-s. 2, of the last-mentioned Act defines total income upon which surtax is based. It is in the following terms :—

" The expression ' total income ' in relation to any person means the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax."

Sect. 39 of the same Act so far as it is material provides as follows :—

Sub-s. 1 : "Such of the provisions of the Income Tax Acts as provide that income tax may be deducted from any payment at the rate or rates of tax in force during the period through which the payment was accruing due, or that there may be deducted from any dividend the tax appropriate thereto, or that a proportionate deduction of the tax charged shall be allowed by any person out of any produce or value payable to him, shall have effect as if they provided that tax may be deducted or shall be allowed at the standard rate for the year in which the amount payable becomes due" : . . . .

Sub-s. 2 : "In estimating under the Income Tax Acts the total income of any person, any income which is chargeable with income tax by way of deduction at the standard rate in force for any year shall be deemed to be income of that year, and any deductions which are allowable on account of sums payable under deduction of income tax at the standard rate in force for any year out of the property or profits of that person shall be allowed as deductions in respect of that year, notwithstanding that the income or sums, as the case may be, accrued or will accrue in whole or in part before or after that year".

The effect of this last-mentioned section seems to place it beyond doubt that where tax may be deducted from a dividend the amount deductible is the sum which equals the standard rate of tax for the year of payment upon the gross amount of the dividend, and that, whenever the profits were earned, the sum from which the deduction is made and the deduction itself are to be treated as income and deduction in respect of the year in which the payment is made.

Thus the deduction permissible from the dividend clearly had no relation to the figure of tax payable by the company to the Revenue, though there was still no obligation on the company to account to the Revenue for what was deducted. The deduction, in fact, was only part of a system by which were measured (1.) the extent of the shareholders' right to have exemption or abatement and (2.) the liability of the shareholder to surtax.

One other provision of the law important to this case must be referred to.

By s. 7 of the Finance Act, 1931, it was enacted so far as material for the present purpose as follows :—

Sub-s. 1 : " The provisions of Rule 20 of the General Rules, which authorize the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which, under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period ".

Sub-s. 2 : . . . . "a dividend paid by a body of persons, whether before or after the commencement of this Act, shall, to the extent to which it is paid out of such profits and gains as are mentioned in sub-s. 1 of this section, be deemed, for all the purposes of the Income Tax Acts, to represent income of such an amount as would, after such deduction of tax as is authorized by the provisions of the said Rule 20, be equal to the net amount received ": . . . .

Now how do the foregoing provisions apply and with what effect to the facts of this case ?

On the one hand it is said by the appellant :—

(1.) That except so far as the dividend can be reduced by deduction it is not liable to tax because dividends as such are not directly assessable to tax.

(2.) That the rents in excess of the annual value as assessed under Sch. A are not in the hands of the Company taxable to income tax at all, and therefore that a dividend paid out of such excess rents is not in the hands of the shareholders taxable to income tax either by deduction or by direct assessment.

(3.) That if the dividend is not liable to any deduction in respect of tax or taxable to income tax in the hands of the shareholders it is not taxable to surtax, and therefore that no part of the sum of 4275*l.* ought to have been included in the assessment of the appellant to surtax.

On the other hand the respondents say:—

(1.) That dividends as such are taxable under Sch. D if not taxed by deduction and therefore upon any view of the case the dividend was income tax income.

(2.) That the rents out of which the dividend in question was paid were in fact charged to tax within the meaning of s. 7, sub-s. 1, of the Finance Act, 1931, and the dividend must therefore be treated as a dividend from which deduction of tax was permissible.

(3.) That upon this footing, inasmuch as the sum of 4275*l.* was the net amount received, the gross dividend must under the provisions of s. 7, sub-s. 2, of the Finance Act, 1931, be treated for surtax purposes as the sum of 5343*l.* 15*s.*

Now I may say at once that, having regard to the view which I have expressed as to the general scheme and operation of the Income Tax Acts in regard to dividends, I am unable to accept the view that dividends as such are taxable under Sch. D. I do not think they are. I think it is accurate to say as Rowlatt J. said in *Purdie* v. *The King* (1): "There is, strictly speaking, no tax upon dividends at all." They are, however, under r. 20 of the General Rules and s. 39 of the Finance Act, 1927, and apart altogether from s. 7 of the Finance Act, 1931, liable, where the dividends are made out of profits or gains charged on the Company, to suffer deduction of a sum equal to tax at the standard rate on the gross amount of the dividends, and in such cases the gross amount of the dividend is the income tax income to be taken into account whether it be for computing the amount of tax which the shareholder is entitled to have returned or for fixing his liability to surtax. It is not disputed that if a dividend is paid out of the profits produced by a sale of a capital asset it is not made out of profits or gains charged on the company,

(1) [1914] 3 K. B. 112, 116.

and therefore no deduction from the dividend is authorized and the dividend itself is not liable to be taken into account in fixing the liability to surtax of the shareholder. Again, where the dividend was paid out of profits or gains not chargeable on the company by reason of the application of the rules relating to the measurement of taxable income, it was held in *Gimson* v. *Inland Revenue Commissioners* (1) (decided before the passing of the Finance Act, 1931) that no deduction was permissible and that the dividend ought not therefore to be taken into account for the purposes of surtax. The Court of Appeal in the present case have held that the decision was wrong. I do not think that it was wrong. The profits or gains in that case were not profits or gains assessed by reason of the rules at nil, but profits or gains not assessable at all. They were therefore not profits or gains to be charged on the Company and no deduction was permissible from a dividend paid out of them. It is unnecessary to express any opinion as to the effect if any of s. 7, sub-s. 1, of the Finance Act, 1931, upon such facts as those dealt with in that case.

In the present case dividends have been paid out of rents arising from hereditaments assessed to tax under Sch. A, the rents exceeding the annual value fixed by the assessments. In my opinion the rents are profits and gains to be charged on the Company within the meaning of r. 20. The fact that the measure of liability in respect of them is an artificial one does not render the rents any the less the things to be charged. In *Coman* v. *Governors of the Rotunda Hospital, Dublin* (2), Lord Birkenhead L.C. said that Sch. A "clearly shows that the object is to tax what for the sake of brevity may, with substantial accuracy, be called the landlord's income." In this connexion I may observe that I do not think that the case of the *Attorney-General* v. *Metropolitan Water Board* (3), affords support to a contrary view. Whether rightly or wrongly decided (as to which I express no opinion) it dealt with a different subject matter—namely, the deduction of tax

(1) [1930] 2 K. B. 246.
(2) [1921] 1 A. C. 1, 12.
(3) [1928] 1 K. B. 833.

from interest, with different rules—namely, rr. 19 and 21, and with words differing both from those used in r. 20 and from those used in s. 7, sub-s. 1, of the Finance Act, 1931. It follows therefore that in my opinion the dividend was one from which deduction was authorized, and having regard to s. 39 of the Finance Act, 1931, authorized at the standard rate for the year of payment in respect of the whole dividend. This result in my view follows in the circumstances of the present case from the true construction of r. 20 and s. 39 irrespective of s. 7, sub-s. 1, of the Finance Act, 1931.

Sect. 7, sub-s. 1, of the Finance Act 1931, was intended to extend the authority to deduct, and seems to me to be directed to meeting the case where a dividend is paid out of a company's actual trading profits for the year, though under Sch. D the company's liability to tax in respect of them is assessed by reference to the profits of the previous year. It does not seem to me to have any appreciable effect in such cases as the present. It follows from what I have said that the dividend in question was part of the income tax income of the appellant to be taken into account in fixing his liability for surtax.

The question, however, remains as to the figure at which it is to be brought in.

Now I think it would be repellent to most minds that the appellant should be charged as a part of his income with a sum which not only has never come to him but has never existed in fact. It is plain that the respondents' cross-appeal, which seeks to treat the sum of 4275*l.* as a net sum, corresponding to a gross sum of 5343*l.* 15*s.*, assumes that the amount divisible by the Company was something in excess of anything they ever had to divide.

It is said, however, that s. 7, sub-s. 2, of the Finance Act, 1931, compels the conclusion that the sum of 5343*l.* 15*s.* is the correct figure to be brought into computation. I do not think that the effect of the statutory provision is as contended for by the respondents. The sub-section in effect provides that it is the gross amount before deduction which is to be treated as the income for the purposes of the

Acts. If a deduction from the gross sum was authorized but was not in fact made, as was the case here, there is in my opinion nothing in the language of the sub-section which entitles the Inland Revenue to treat the gross sum as being greater than in fact it was. From the income tax point of view it makes no difference to the Revenue whether the deduction is made or not because the Company does not have to account for what it deducts.

In my opinion, for the reasons which I have endeavoured to indicate, but which do not accord in all respects with those relied upon by the Court of Appeal, both the appeal and the cross-appeal fail and should be dismissed with costs and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE. My Lords, the appellant is a shareholder in a company called Salisbury House Estate, Ld. In the tax year 1929–30 the appellant received from the Company a sum of 4275*l.* described as a net interim dividend of 4275*l.* free of tax. This sum represented with the addition of tax at the standard rate for that year a sum of 5343*l.* 15*s.* The question is whether any sum, and if so what sum, in respect of this interim dividend ought to be included in the appellant's return of income from all sources for the purposes of surtax in the year 1929–30. The appellant contends that he is under no obligation to include in his return any item in respect of the dividend or at all events no larger sum than the 4275*l.* The respondents contend that he is bound to include the gross sum of 5343*l.* 15*s.*, and that sum was accordingly included in the assessment for the year 1929–30. On appeal to the Special Commissioners this assessment was confirmed. On appeal to the King's Bench Division, Finlay J. allowed the appeal and discharged the assessment, but, on appeal to the Court of Appeal, that Court by an Order of January 19, 1933, reversed the order of Finlay J. and confirmed the assessment, but for the sum of 4275*l.* only. The appellant seeks to restore the order of Finlay J. and the Commissioners seek to have the assessment confirmed for the total amount of 5343*l.* 15*s.*

The Company owns a property in the City of London the rents of which greatly exceed the "annual value" on the amount of which the Company is assessed to tax under Sch. A as the owner of the property in question. The profits of the Company available for dividend, and the ordinary annual dividends, have for many years exceeded the amounts on which under Sch. A income tax has been paid by the Company. The Crown then raised the contention that the Company was carrying on a trade under Sch. D and that for the purposes of an assessment under that Schedule all its receipts including receipts from rents must be included. This contention on the part of the Crown was finally disposed of by this House on April 4, 1930, in *Fry* v. *Salisbury House Estate, Ld.* (1) In that case it was decided that, so far as the ownership of the house was concerned, the Company had been fully assessed under Sch. A in respect of the annual value and was under no liability to be further assessed under Sch. D. The Company then made to the appellant the payment of 4,275*l.* above referred to. The payment was made out of a sum of 18,325*l.* put aside out of its profits as an income tax reserve pending the decision above mentioned. This last mentioned sum had been taken from a surplus of accumulated rents which remained in the hands of the Company after profits had been distributed to the amount of any assessment made upon the Company.

The letter accompanying the cheque for 4275*l.* stated that it was an interim dividend for the year ending December 25, 1930, at 5 per cent. free of tax and was equivalent to a gross amount of 5343*l.* 15*s.* less income tax at 4*s.* in the pound, 1068*l.* 15*s.* = 4275*l.* and it contained the usual certificate that the income tax deducted had been or would be duly paid to the proper officer for the receipt of taxes.

Later the Company adopted the position that the fund out of which the dividend was paid was untaxed income in the hands of the Company and not taxable in the hands of the appellant and should not be included in any return of total income. They also withdrew the certificate relating to the payment of tax.

(1) [1930] A. C. 432.

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REVENUE
COMMISSIONERS.

Lord Warrington of Clyffe.

The present appeal raises two questions. First, whether in the hands of the appellant as a shareholder the dividend in question is subject to tax, and secondly, if it is, should the appellant include in his return of total income from all sources the gross sum of 5343*l*. 15*s*. or the 4275*l*.

In the Court of Appeal the first of these questions was decided in favour of the Crown and the second in favour of the appellant.

As to the first, in my opinion the judgment of the Court of Appeal was correct. I have had the advantage of reading and considering the opinion of my noble and learned friend on the Woolsack and I am clearly of the opinion that the views he has expressed are correct. In particular I agree that dividends as such are not taxable under Sch. D, but that, where they are made out of profits and gains charged on the Company they are liable to suffer deduction under the provisions of r. 20 of the General Rules and s. 39 of the Finance Act, 1927, and that the gross amount is income tax income to be taken into account whether it be for determining a claim for return of tax or for fixing the liability to surtax.

In the present case the dividend has been paid not out of capital but out of rents arising from property assessed to tax under Sch. A, and these units are in my opinion profits and gains to be charged on the Company under r. 20, notwithstanding that the measure of liability is not the amount of the rents themselves but the annual value of the hereditaments from which they arise.

If this is so then the dividend was one from which deduction of tax was authorized and would be income tax income to be included in the return of income from all sources for the purposes of surtax.

This brings me to the second question namely, at what figure is the dividend to be brought in ? Here again I agree with my noble and learned friend. In such a case as this, namely where no deduction is in fact made, there is no distinction between a gross sum and a net sum. The actual sum paid, and not some wholly fictitious sum, is therefore that which should be included in the return of income.

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I concur in the order proposed by my noble and learned friend.

LORD WRIGHT. My Lords, I also agree.

By paragraph xvii of the Fifth Schedule to the Income Tax Act, 1918, a person claiming any allowance or deduction is required (inter alia) to state "the amount of rents, interests, annuities or annual payments in respect of which the claimant is liable to allow the tax" as an item in the Declaration and Statement of his Total Income. After supertax was imposed in 1910 (the place of which is now taken by surtax) a taxpayer is similarly required to declare his total income including the same item. Thus the statement of total income which was originally required to enable the taxpayer to claim a benefit is now required to enable the Revenue Authorities, in proper cases, to compute the surtax, and no doubt this latter purpose is now more important than the original object. Under the head of Annual Payments fall dividends from companies in which the taxpayer is a shareholder.

There are now certain rules with regard to such dividends which, so far as relevant for this appeal, are to be found in the Income Tax Act, 1918, in r. 20 of the General Rules applicable to all Schedules, and in certain subsequent amending Acts. Rule 20 is in these terms :—

"The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

As I interpret this Rule the profits or gains in respect of which the right of deduction is so given are profits or gains which have been charged to tax.

"Body of persons" by the definition in s. 237 of the Act includes companies ; partnerships are separately dealt with. By s. 33 of the Finance Act, 1924, every warrant or cheque of a company in payment of any dividend must have annexed thereto or be accompanied by a statement in writing showing (*a*) the gross amount which after deduction of the income tax appropriate thereto corresponds to the net amount actually paid; (*b*) the rate and the amount of income tax appropriate to such gross amount; and (*c*) the net amount actually paid. By s. 39 of the Finance Act, 1927, it is enacted (inter alia) that the provisions for the deduction from any dividend of the tax appropriate thereto shall have effect as if they provided that the tax may be deducted at the standard rate for the year in which the amount payable became due. Sect. 7 of the Finance Act, 1931, which is retrospective, by sub-s. 1, provides that r. 20 shall be considered as authorizing the deduction of tax from the full amount paid out of profits and gains which have been charged to tax or which under the provisions of the Income Tax Acts would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provisions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period. By sub-s. 2 any dividend paid by a body of persons shall to the extent that it is paid out of such profits and gains as are mentioned in sub-s. 1 be deemed for all the purposes of Income Tax Acts to represent income of such an amount as would after such deduction of tax as is authorized by the provisions of the said r. 20 be equal to the net amount received. Rule 20 is in effect based on s. 54 of the Income Tax Act, 1842, with the substitution of the words "the tax appropriate thereto" for the words "the tax proportionate thereto."

The scheme of these provisions as I understand them is to impose the tax on all the profits of the company at the source: if and so far as these profits have been so taxed, they are not liable to any further tax (other than surtax) in the hands of the shareholder receiving the dividend. The shareholder and the company are no doubt separate entities: the company is not an agent for the shareholder to pay tax on the dividend, nor is the company the collector for the Revenue to deduct the tax from the dividend. The company is the taxpayer. The shareholder has no right to any share in the profits till a dividend is declared: the company may use the profits in any way it pleases vis-a-vis any shareholder : it may put them to reserve or capitalize them or use them for extensions or improvements : the profits declared and paid as dividends in one year may have been made in previous years when the standard rate of tax was different : it is only very rarely and in exceptional cases that dividends are paid out of any particular source of profit : usually they are paid out of the general revenue fund of the company. What is essential to the requirements of the Inland Revenue is that all the profits of the company should be taxed and if that is done the Revenue is not concerned with what is done with these profits. The company is not bound but only authorized to deduct tax in paying dividends : whether it deducts or not is left to its discretion because the profits once having been taxed in the company's hands, do not bear further tax (apart from surtax) in the shareholders' hands. There is in fact only one profit, no new profit being created from the fact that the shareholder gets his share : the tax is a tax on the profits and not on the dividend. But if tax is deducted from the dividend the Acts have provided that it is to be at the standard rate of tax of the year of the dividend, in order to avoid obvious difficulties which might arise because profits divided in one year may have been earned in other years. The provisions of s. 7 of the Finance Act, 1931, will be considered by me more particularly in connection with the cross-appeal.

On a careful review of these provisions, I reach the conclusion that a shareholder is not separately taxable (I disregard surtax) on a dividend, as a profit individual to himself, under Sch. D, Case VI, as the Court of Appeal held, or at all. Apart from what I conceive to be the clear effect of the Acts in this regard, I think the position has been so stated by this House more than once, at least as matter of observation : thus in *Inland Revenue Commissioners* v. *Blott* (1), Viscount Cave thus explained the system :—

" Plainly, a company paying income tax on its profits does not pay it as agent for its shareholders. It pays as a taxpayer, and if no dividend is declared the shareholders have no direct concern in the payment. If a dividend is declared, the company is entitled to deduct from such dividend a proportionate part of the amount of the tax previously paid by the company; and in that case the payment by the company operates in relief of the shareholder."

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(1) [1921] 2 A. C. 171, 201.

In *Bradbury* v. *English Sewing Cotton Co.* (1), Lord Wrenbury thus expressed the same idea in concise form: "The corporator bore his share of the tax by the deduction of the appropriate share of the collective tax paid by the corporation from his dividend."

Lord Phillimore expresses the same view (2); "As in ordinary cases of a taxed company the shareholder is taken to have paid the tax upon his dividends through the company and is not assessed or taxed upon them." These cases and other similar statements of the principle which I need not quote were no doubt made with reference to s. 54 of the Income Tax Act, 1842, but I do not think that the substitution in the later Act of the word "appropriate" for the word "proportionate" in the earlier Act, affects the principle. In 1842 the modern development of limited companies was not in contemplation: "proportionate" was an apt word for the simple cases of corporators where each year the corporators shared in definite proportions the available net income: "appropriate" tax, which is more precisely defined by the Finance Act of 1927 as being at the standard rate of the year of payment, is clearly a more apt term in connection with the dividends of a company. But the same view has been expressed in regard to r. 20 of the Act of 1918, for instance, by Lord Sterndale and Lord Warrington in *Sheldrick* v. *South African Breweries, Ld.* (3)

The Court of Appeal, in deciding against the appellant on the ground that the dividend he received was separately taxable in his hands at the standard rate (because charged with income tax under Sch. D) found some support for their decision in *Hamilton* v. *Inland Revenue Commissioners* (4): in that case the shareholder claimed that he was only liable to be taxed to the extent of a proportionate part (that is in the proportion that his shareholding bore to the total issued capital of the company), and not on the basis of the tax appropriate to his actual dividend. That contention was rightly rejected both by Rowlatt J. and by the Court of Appeal. But the decision did not involve, or require, as I think, any conclusion that dividends were separately taxable in the shareholder's hands under Sch. D, nor did Rowlatt J. so think, though certain dicta in the Court of Appeal may seem to point that way.

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(1) [1923] A. C. 744, 766.
(2) Ibid. 771.
(3) [1923] 1 K. B. 173.
(4) [1931] 2 K. B. 495.

I cannot, with respect, go with the Court of Appeal in dismissing the appellant's appeal on the ground that the dividend, not being a capital distribution, was chargeable with income tax under Sch. D. For the reason I have stated I think that is not in accordance with the provisions of the Acts.

But there still remains to be considered the question whether the Company was authorized to deduct tax from the dividend either under r. 20 or now under s. 7 of the Act of 1931. The answer to that question depends on determining whether the dividend paid to the appellant was paid out of profits and gains charged to tax. Thus, where a dividend was paid out of profits which were not chargeable to income tax, it was held by Rowlatt J. in *Gimson* v. *Inland Revenue Commissioners* (1) that supertax was not payable. Part of the dividend was in respect of profits of a capital nature, part out of profits which were not assessable by reason of the rules of admeasurement. I think the decision was correct as the law then stood, though as regards the latter class of profits the case may now need to be considered afresh in the light of s. 7 of the Finance Act, 1931, that is on the question whether such profits were or were not chargeable. The present case is peculiar in that the moneys out of which the dividend came, are taken to be identified as paid out of the sums put aside from the profits of the Company, the Salisbury House Estate Ld., as a reserve pending the decision of their dispute with the Inland Revenue; the dispute was eventually settled by the decision of this House in *Fry* v. *Salisbury House Estate, Ld.* (2), which went in favour of the

(1) [1930] 2 K. B. 246.

(2) [1930] A. C. 432.

Company. The Company's main business, being that of letting premises which were its property for use as flats, was assessed under Sch. A, that is, the property tax. The rents or profits amounted to a sum largely in excess of the assessment, but it was held that the excess beyond the amount of the Sch. A assessment could not be the subject of a separate and further assessment under Sch. D. The sum put to reserve by the Company was therefore free, and out of that sum the dividend in question was thereupon paid.

It was contended on behalf of the appellant that this sum, segregated in this way, was not taxable at all and hence neither r. 20 nor s. 7 applied : only so much, it was contended, was charged to tax as corresponded to actual figures of assessment, so that the Sch. A assessment exhausted the taxable capacity of the Company's income from the flats, and hence the surplus fund, out of which the dividend was paid, was not charged to tax. But the reasoning of this House in the case just cited, seems to me to show that the income or profits from the rents, whatever their amount, were exhaustively dealt with in their taxable capacity by the Sch. A assessment, so that no part of that income could be described as untaxed. The actual attempt to split up the fund into the amount taxed under Sch. A and the balance remaining beyond that amount was in my opinion a purely artificial segregation : the fund in truth was, I think, a single fund of profits which was assessed and charged as a whole and once for all under Sch. A. I think this is clear from the reasoning of the noble and learned Lords. Thus, if I may quote a few brief excerpts, Lord Dunedin says (1), "The rents, having been assessed under Sch. A, are, so to speak, exhausted as a source of income." Lord Atkin says (2), that even if the Company "trade in letting houses, their income, so far as it is derived from that part of their trading, must be taxed under Sch. A and not Sch. D." Lord Macmillan says (3), "Property in land, as a source of income is dealt with, and can only be dealt with, under Sch. A, and the rules of that Schedule prescribe how the income from landed property is to be

(1) [1930] A. C. 432, 440.
(2) Ibid. 458, 459.
(3) Ibid. 467.

ascertained and measured. If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property so much the worse for the revenue." In my judgment the dividend in question was paid out of the income, or profits and gains, from the Company's property, which were taxed as a whole and comprehensively under Sch. A, irrespective of any subsequent dissection, and was accordingly paid out of profits and gains charged to tax.

The Court of Appeal in deciding that the segregated portion of the rents out of which the dividend in question was paid, had not been charged to tax, placed some reliance on the case of the *Attorney-General* v. *Metropolitan Water Board* (1), where large sums of interest were paid out of the actual profits of the year, but owing to the rules applicable the profits were not assessable in that year because in the preceding year there had been no profits and hence the assessment in the year in which the payments were made was nil. That case was regarded by the Court of Appeal as involving a principle applicable to the facts of the present case that the profits and gains charged to tax were limited to the sum taken to measure the liability for the charge. That case did not relate to dividends payable to shareholders but to annual payments to creditors of the company: to such a case not r. 20 but rr. 19 and 21 apply. I desire to express no view in regard to that case: I do not regard it as relevant here. Furthermore in the present case there is no question of a nil assessment: for the reasons I have attempted to summarize above, I think that there has been a full assessment of, and charge on, the profits and gains out of which the dividend was paid. On that view of the position, the dividend here in question was a dividend from which the deduction of tax was authorized so that whether tax were deducted or not, the dividend must be brought into account by the appellant in the return of his total income and accordingly becomes liable to surtax. On this ground the appeal should, in my opinion, fail.

But I now turn to the cross-appeal of the Crown. The cheque or warrant originally sent to the appellant was for

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(1) [1928] 1 K. B. 833.

4275*l*., with a statement that it represented a gross amount of 5343*l*. 15*s*.; this was later corrected by a statement that 4275*l*. represented a distribution of untaxed income and was an " actual " sum. It was in fact the appellant's proportionate part of the total fund held in reserve as representing the amount of rents in excess of the Sch. A assessment. The Court of Appeal having held, as I have already stated, that the dividend of 4275*l*. was liable to income tax under Sch. D, and also held that the sum out of which it was paid was not charged to tax, went on to dismiss the cross-appeal on the ground that there could not be a charge of surtax unless on sums liable to be charged to income tax and hence that 4275*l*. was all that the Revenue could bring into charge for surtax. I have already explained why I cannot agree with this view and must go on to consider the question on the basis that 4275*l*. was paid out of a fund charged to tax.

The claim of the Revenue in the cross-appeal is no doubt anomalous, because if what was being distributed was in fact the whole balance of the rents in excess of the Sch. A assessment, the contention that the dividend is to be taken at the gross amount of 5343*l*. 15*s*. means that so much more is taken to come out of the fund than was ever in the fund. It is however contended on behalf of the respondents that under s. 7, sub-s.2, of the Act of 1931, the dividend of 4275*l*. being paid out of profits such as are mentioned in sub-s. 1, must be deemed to represent the gross amount, namely, 5343*l*. 15*s*., which results from adding the appropriate tax to 4275*l*. This result it is argued follows because the sub-section has fixed a purely arbitrary and conventional standard: the Company paying the dividend is not bound, but only authorized, to deduct tax: that is a matter between it and the shareholder: the Revenue is not concerned so long as it gets the tax from the Company: but the Revenue, being further concerned in regard to surtax with the position of the shareholder, the Act has provided that the shareholder, though he is not assessed to income tax on the dividend, is " deemed " to have paid it, because whatever actual sum he receives by way of dividend is " deemed " to have been reduced to its actual figure by deduction of the

Lord Wright.

appropriate tax, and hence, it was contended, the returns of total income are to be taken at the higher or gross figure. This would no doubt redound to the benefit of the taxpayer in cases where he is entitled to claim an allowance or deduction; but in such a case as the present where surtax is involved it would be very beneficial to the Revenue.

That was the argument: it is an argument which would involve in this case a purely fictitious figure; the surtax would be levied on a figure of 5343*l*. 15*s*. whereas the gross or total sum which the appellant could receive as his share out of the whole fund of the profits which were being divided could not be more than 4275*l*. Yet however anomalous the claim it must receive effect if the actual language of the section so requires. But I think the claim of the respondents fails because it ignores the word "net" in sub-s. 2. That word involves the idea of deduction, which in this case must be a deduction of tax. Thus in s. 33 of the Income Tax Act, 1924, "the net amount actually paid" is the amount arrived at by the deduction from the gross amount of the appropriate tax. In *Hamilton's* case (1) the very careful statement by the Commissioners speaks of "the almost universal practice to deduct from the gross amount of the dividend the tax appropriate to that amount, or, if the dividend is declared to be 'free of tax', to treat it, for the purposes of computing total income, as equivalent to the gross amount which, after deduction of the appropriate tax, corresponds to the net amount actually paid, without any reference to the amount of the company's 'statutory' income." But the present case has proceeded on the basis of a specially segregated fund, the whole of which was distributed without any deduction for tax; nor was the dividend in fact, nor could it be, described as "tax free," a phrase which is used to indicate that the dividend is net and under prior deduction of tax. Such a case as the present is unusual because a fund has been segregated and divided in toto: hence if the Company had deducted tax it would have been from a gross amount, not of 5343*l*. 15*s*. but of 4275*l*., and equally if the dividend had been "tax free" it would have been a dividend of the net amount after the appropriate deduction of tax had been made from the sum of 4275*l.* Furthermore, in the Company's hands, no greater sum in respect of this fund was chargeable to income tax than 18,325*l.*, of which 4275*l.* was the appellant's aliquot proportion. What was distributed, being 4275*l.*, was in my judgment the gross amount: the Company, though authorized to deduct tax from it, were not bound to deduct it and did not in fact do so. I cannot see any justification for describing the sum distributed as a "net amount" and hence I conclude that s. 7, sub-s. 2, does not apply. I cannot treat the word "net" as mere surplusage or as simply meaning the actual amount, whether gross or net.

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(1) [1931] 2 K. B. 495, 502, 503.

For these reasons, I think that both the appeal and the cross-appeal should be dismissed.

*Order of the Court of Appeal complained of in the original and cross-appeal affirmed; original and cross-appeals dismissed: ordered that the appellant in the original appeal do pay to the Commissioners of Inland Revenue the costs incurred by them in respect of the original appeal and that the appellants in the cross-appeal do pay to the said Ludwig Neumann the costs incurred by him in respect of the cross-appeal, such costs to be set off, and the balance of the said costs in respect of the original and cross-appeals to be certified by the Clerk of the Parliaments.*

*Lords' Journals*, February 1, 1934.

Solicitors for appellant: *Holmes, Son & Pott.*
Solicitor for respondents: *The Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

H. L. (E.)* RUDD (BY HIS NEXT FRIEND) (PAUPER) . APPELLANT;

1934

*Feb. 5.*

AND

ELDER, DEMPSTER AND COMPANY, LIMITED . . . . . . . . . . RESPONDENTS.

THE appellant on January 30, 1933, presented a petition of appeal from the order of the Court of Appeal. (1) On February 5, 1933, the day appointed for considering the petition, counsel having been called in informed the House that the parties had come to a compromise and were agreed that judgment should be given in terms of the prayer of the petition. And counsel for the appellant having stated that the said compromise was for the benefit of the appellant, it was ordered by consent that the appeal should be withdrawn and that the respondents should pay into the King's Bench Division the sum of 2000*l.* to be transferred to the County Court of Lancashire holden at Liverpool to be invested for the benefit of the appellant as the county court should think fit. It was further ordered that the respondents should repay the costs of the appellant in the King's Bench Division and pay the appellant's costs in the Court of Appeal and in this House.

*Lords' Journals*, Feb. 5, 1934.

*Goldie K.C.* and *Maxwell Fyfe* for the appellant.
*Lynskey K.C.* and *Sellers* for the respondents.

Solicitors for appellant: *Helder, Roberts, Giles & Co., for J. A. Behn, Liverpool.*

Solicitors for respondents: *Lawrence Jones & Co., for Forwood, Williams & Grindrod, Liverpool.*

* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

(1) [1933] 1 K. B. 566.

[HOUSE OF LORDS.]

H. L. (E.)*

1934

*Feb.* 16.

MARTIN COLES HARMAN . . . . APPELLANT;

AND

THE OFFICIAL RECEIVER, THE PETITIONING CREDITORS, AND THE TRUSTEE . . . . . . RESPONDENTS.

*Bankruptcy — Practice — Appeal — Adjudication — Order of Court of Appeal rescinding on terms—Term not complied with—Order of Court of Appeal rescinding its Order and restoring Order of Adjudication—Leave to appeal refused—Preliminary objection that appeal not competent—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 96, 108, *sub-s.* 2 (*b*).

The appellant was adjudicated a bankrupt on August 22, 1932. On October 24, 1932, the Court of Appeal allowed an appeal from the order of adjudication upon certain terms, and ordered that the application for adjudication be adjourned. One of the terms not having been complied with the appellant moved the Court of Appeal to vary its order, but on February 10, 1933, the Court of Appeal rescinded its order of October 24, 1932, and restored the order of adjudication so as to have effect from August 22, 1932. The Court of Appeal refused the appellant leave to appeal from its order of February 10, 1933. Nevertheless he appealed, and the objection was taken that under s. 108, sub-s. 2 (*b*), of the Bankruptcy Act, 1914, the appeal was not competent, as it was an appeal "in bankruptcy matters" and leave to appeal had been refused. The order of February 10, 1933, purported to be made "in bankruptcy matters" and the appellant so treated it in his petition of appeal to the House of Lords. The courts having jurisdiction in bankruptcy, which under s. 108, sub-s. 1, of the Act of 1914 might review, rescind, or vary any order made by them under their bankruptcy jurisdiction, were by s. 96 confined to the High Court and county courts, and it was alleged that therefore the Court of Appeal had no power to exercise that jurisdiction of reviewing, rescinding, or varying its order:—

*Held*, that if the order was a complete nullity the House could not deal with it, but if it were to be regarded as an order of the Court of Appeal it fell within the provisions of s. 108, sub-s. 2 (*b*), which expressly limited the jurisdiction of the House in respect of orders made "in bankruptcy matters" where leave to appeal had been refused by the Court of Appeal.

Appeal dismissed as incompetent.

APPEAL from an order of the Court of Appeal dated February 10, 1933.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

H. L. (E.)
1934

Martin Coles Harman v. The Official Receiver, The Petitioning Creditors, and The Trustee.

The question arising for decision on the preliminary point taken on behalf of the Official Receiver was whether the Court of Appeal having, on an application made by the appellant on February 24, 1933, refused leave to appeal to the House of Lords, this appeal, having regard to s. 108, sub-s. 2 (*b*), of the Bankruptcy Act, 1914, would lie.

The facts are shortly stated in the headnote and are fully set out in the judgment of Lord Tomlin, together with the material parts of s. 108, sub-s. 1 and sub-s. 2 (*b*), of the Bankruptcy Act, 1914.

Feb. 15, 16. *Sir Thomas Inskip A.-G.* and *C. N. Tindale Davis* for the Official Receiver on the preliminary point. The order of the Court of Appeal dated February 10, 1933, was made "in bankruptcy matters" and therefore there lies no appeal to this House where, as here, the Court of Appeal refused the appellant leave to appeal from the order. That follows from the provision of sub-s. 2 (*b*) of s. 108 of the Bankruptcy Act, 1914. The appellant in his petition of appeal to this House treated the order as one made "in bankruptcy matters."

*F. de Verteuil* and *G. G. Beagley* for the appellant. The Court of Appeal in making the order of February 10, 1933, purported to act under s. 108 of the Bankruptcy Act, 1914, but by s. 96 of that Act the courts which by sub-s. 1 of s. 108 were given power to review, rescind, or vary any order made by them under their bankruptcy jurisdiction, are the High Court and the county courts, therefore the Court of Appeal had no power to rescind its own order and revive the order of adjudication and in doing so acted without jurisdiction. Further, the order now appealed from was not in fact an order made "in bankruptcy matters," consequently the provision in s. 108, sub-s. 2 (*b*), of the Act of 1914 that, without leave of the Court of Appeal, no right of appeal to this House exists in bankruptcy matters, is inapplicable.

[Lord Tomlin. You have to show that this House has power to intervene when the Court of Appeal intervenes improperly. It may be it was an order the Court of Appeal had no power to make, but the question then arises whether an appeal lies to this House.]

*F. de Verteuil.* The jurisdiction of the Court of Appeal is laid down in ss. 26, 27, and 28 of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 30 provides that motions for a new trial in any cause in the High Court shall be heard by the Court of Appeal, but under sub-s. 2 nothing in that section is to alter the practice in bankruptcy. The only case in which the jurisdiction under s. 108 of the Act of 1914 has been discussed is *In re a Debtor ; Debtor, Ex parte* (No. 1088 of 1923), (1) which had very similar facts, but s. 96 was not referred to. The appellant should be allowed to revert to the position which existed on October 24, 1932.

*W. N. Stable* for the respondents, the petitioning creditors.

*Melford Stevenson* for the trustee in the bankruptcy.

Feb. 16. LORD TOMLIN. My Lords, this is an appeal from an order of the Court of Appeal made on February 10, 1933, by which the appellant, Martin Coles Harman, was adjudicated bankrupt. There has been lodged by the Official Receiver, one of the respondents, a petition raising a preliminary objection to the appeal, basing the objection upon s. 108 of the Bankruptcy Act, 1914, and contending that the appeal is, by reason of the provisions of that section, incompetent. Sub-s. 1 of s. 108 of the Bankruptcy Act, 1914, provides : " Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction," and sub-s. 2 provides : " Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows : . . . . (*b*) Where the order (not being an order on appeal from a county court) is made by the High Court, an appeal shall lie to the Court of Appeal, and an appeal shall, with the leave of the Court of Appeal, but not otherwise, lie from the order of that court to the House of Lords." Now it is said by those who support the preliminary objection, putting it shortly, that this was an order in bankruptcy matters which required, for appeal from the Court of Appeal to this House, the leave of the Court of Appeal, that that leave has been refused, and therefore that an appeal to this House is incompetent. I ought to add that under s. 96 of the Bankruptcy Act, 1914, the courts having jurisdiction in bankruptcy are the High Court and the county courts.

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(1) (1924) B. & C. R. 1.

The facts of this case are shortly these. The appellant in July, 1932, had an order made against him by the Court of Appeal. That order affirmed a judgment made against him in an action in the Chancery Division whereby he became liable to pay a large sum of money. The judgment creditors in those proceedings petitioned in bankruptcy against the appellant, and on August 22, 1932, the appellant was adjudicated a bankrupt. On September 12, 1932, he gave notice of appeal, and on October 24, 1932, the Court of Appeal allowed the appeal upon terms. An elaborate order was then made by the Court of Appeal to this effect: "Upon the appellant by his counsel undertaking to the Court: (1.) To procure the payment to the Official Receiver of a sum sufficient to defray the proper expenses of the Official Receiver incurred and to be incurred in regard to Lundy Island; (2.) Not to incur any fresh debts or charge or realize his assets except for the ordinary living expenses of himself and family and the carrying of this order into effect," it was ordered that the appeal should be allowed and the order of adjudication of August 22, 1932, discharged; and it was ordered that the appellant should lodge with the Official Receiver an amended proposal, within a certain number of days, that the Official Receiver should call and hold a meeting of creditors to consider the amended proposal, and that the meeting should be held and made effective before December 1, 1932. It was further ordered "that the appellant make it a term of the amended proposal that the sum of 20,000*l*. be lodged on or before the 24th day of November, 1932, and a further sum of 100,000*l*. be lodged on or before the 16th day of January, 1933, both sums to be lodged in Court." Then it was also ordered that the application made pursuant to the provisions of s. 18 of the Bankruptcy Act, 1914—that was the application for adjudication—should be adjourned until after the proposal had been submitted to the meeting of creditors, and that if the proposal was accepted, then the application should be adjourned "until the application to the Court to approve the composition shall have been approved or disapproved by the Court"; and after certain provisions about costs, there was liberty to apply reserved. On December 8, 1932, the amended proposal was approved by the majority of the creditors, and the amended proposal included the necessary provisions with regard to the lodgments of the two sums of 20,000*l.* and 100,000*l.* The lodgment of 20,000*l.* was made pursuant to the terms on November 24, 1932.

Then on December 22, 1932, the appellant appealed to the House of Lords against the order of the Court of Appeal in the Chancery action, that is to say, against the order affirming the judgment giving rise to the judgment debt upon which the adjudication was based. The result of that seems to have been that those who were going to finance the appellant in relation to the deposit of 100,000*l.* to be made on January 16, 1933, did not see their way to find the necessary money, and thereupon, on January 31, 1933, the deposit of 100,000*l.* not having been made on January 16, 1933, in accordance with the amended proposal, the appellant moved the Court of Appeal to vary its order of October 24, 1932. The notice of motion was in this form: The Court was moved "for an order that the above recited order may be varied insomuch that the sum of 100,000*l.* or such sum as will provide a composition of five shillings in the pound in respect of the debtor's unsecured creditors ordered to be lodged in Court on or before the 16th day of January, 1933, shall not be lodged in Court until the appeal to His Majesty the King in His Court of Parliament against the judgment of the Court of Appeal dated the 7th day of July, 1932, affirming the judgment of Mr. Justice Clauson dated the 5th day of March, 1932 . . . . be heard or for such other order as may seem just to this Court." That motion was heard on February 10, 1933, and the Court of Appeal then made the order against which it is now sought to appeal. That order rescinded the order of

October 24, 1932, and restored the order of adjudication of August 22, 1932, so as to have effect as of the 22nd day of August, 1932; then certain directions were made as to costs, and it was directed "that the sum of 20,000*l.* paid into Court . . . . be dealt with by the Registrar upon a proper application being made." Against that order the appellant desired to appeal, and accordingly on February 24, 1933, he applied to the Court of Appeal for leave to appeal to your Lordships' House. That leave was refused. Notwithstanding, he has appealed, and the point now raised is whether that appeal is competent.

The respondent bases his objection to the appeal upon s. 108, sub-s. 2 (*b*), of the Bankruptcy Act, 1914. He says that this is an appeal "in bankruptcy matters," that the leave of the Court has not been obtained, and that therefore the appeal is incompetent. Apart from the considerations which the appellant has placed before your Lordships' House, there is no doubt that this is an order "in bankruptcy matters." That accords with the view expressed by your Lordships' House in *Chatterton* v. *City of London Brewery Co., Ld.* (1), where it was held that no appeal lies to your Lordships' House "from an order of the Court of Appeal affirming a receiving order where the Court of Appeal refuses leave to appeal."

It is said, however, on behalf of the appellant that the appeal is competent, and competent for this reason as I understand it: that the order appealed against was made without jurisdiction, and that it was made without jurisdiction because the courts "having jurisdiction in bankruptcy," which under s. 108, sub-s. 1, of the Bankruptcy Act, 1914, "may review, rescind or vary any order" made by them under their bankruptcy jurisdiction are, by the definition in s. 96 of that Act, confined to "the High Court and the County Courts"; that the Court of Appeal has no power to exercise that jurisdiction of reviewing, rescinding, or varying its order; that therefore, in rescinding the order of October 24, 1932, and making a new order whereby it revived the adjudication it was acting without jurisdiction and the order was a nullity; and that therefore (he urges) it

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(1) [1915] A. C. 631.

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was not an order "in bankruptcy matters." His difficulty, I think, is this: If it was a complete nullity it is difficult to see where the jurisdiction of your Lordships' House to deal with it lies; if it is to be regarded as an order of the Court of Appeal, and therefore prima facie an order in regard to which there is a right of appeal to your Lordships' House under the Appellate Jurisdiction Act, 1876, it must also be treated as an order in the matter in respect of which it purported to be made. Now it undoubtedly purported to be made "in bankruptcy matters," and indeed the appellant so treats it in his petition of appeal; and if it is in fact to be treated as an order made "in bankruptcy matters," then it falls within the provisions of s. 108, sub-s. 2 (*b*), which expressly limits the jurisdiction of your Lordships' House in respect of orders made "in bankruptcy matters."

For those reasons it seems to me that the appeal here is incompetent, and that therefore the appeal should be dismissed, and I move your Lordships accordingly.

LORD WARRINGTON OF CLYFFE: My Lords, I agree, and have nothing to add.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD MACMILLAN. My Lords, I also agree.

LORD WRIGHT. My Lords, I also agree.

*Appeal dismissed with costs as incompetent.*

*Lords' Journals*, February 16, 1934.

Solicitor for the appellant: *V. Reece-Jones.*

Solicitors for the respondent, the Official Receiver: *Solicitor, Board of Trade.*

Solicitors for the respondents, the petitioning creditors: *Bartlett & Gluckstein.*

Solicitors for the respondent, trustee in bankruptcy: *Gilbert Samuel & Co.*

[HOUSE OF LORDS.]

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1934
March 27.

SIR WILLIAM HENRY PEAT (LIQUIDATOR OF M. I. G. TRUST, LIMITED) . . . APPELLANT;

AND

GRESHAM TRUST, LIMITED . . . . RESPONDENTS.

*Bankruptcy—Company—Winding-up—Suffering judicial proceeding—" With a view of giving . . . . a preference "—Fraudulent Preference—No direct evidence of intent to prefer—No inference of intent to prefer to be drawn —Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44—*Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 265.

The debtor company of which the appellant became the liquidator deposited with the respondent Trust title deeds of certain property to secure a sum of money owing by it to the Trust, agreeing to execute any necessary deed in respect of the property charged. The Trust did not register the charge within the prescribed time, and ten months afterwards applied to the Chancery Division under s. 85 of the Companies Act, 1929, for an extension of the time for registration on the ground of inadvertence. The company, at the time of that application, was unable to pay its debts, and counsel were briefed on behalf of the company to oppose the application for extension of time, but before the hearing of the application the instructions to oppose were withdrawn, an order was made for an extension of the time, and the charge was registered. An order for the compulsory winding-up of the company was made shortly afterwards, and the liquidator issued a summons in the winding-up claiming that the withdrawal of the opposition of the company was the suffering by it of a judicial proceeding with a view of giving a creditor a preference, and therefore must be deemed fraudulent and void as against the liquidator, having regard to the provisions in s. 44 of the Bankruptcy Act, 1914, and s. 265 of the Companies Act, 1929. W., who gave instructions for the withdrawal of the opposition by the company, was a director of the company and managing director of the Trust:—

*Held*, that the onus was on the liquidator to satisfy the Court that the dominant intention of the company in withdrawing its opposition to the application for an extension of time was to prefer the respondents and, there being no direct evidence of such an intention, an intent to prefer could not be inferred.

*Sharp* v. *Jackson* [1899] A. C. 419 applied.

The decision in *In re Cohen. Ex parte Trustee* [1924] 2 Ch. 515 did not justify the contention that given the withdrawal of opposition and the consequences of the withdrawal, then the intent to prefer must be inferred.

Order of the Court of Appeal [1933] Ch. 542 affirmed.

* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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APPEAL from an order of the Court of Appeal (1) reversing an order of Eve J. and allowing the appeal of the respondents from that order.

The facts are shortly stated in the headnote and are fully set out in the judgment of Lord Tomlin, together with material sections of the Bankruptcy Act, 1914, and the Companies Act, 1929.

Feb. 20, 22, 23. *J. Millard Tucker K.C.* and *H. M. Pratt* for the appellant. Sect. 79, sub-s. 1, of the Companies Act, 1929, provides that charges by a company shall be void against the liquidator and creditors of the company unless the prescribed particulars of the charge are supplied for purposes of registering the charge. Where a preference results in fact from the suffering of a judicial proceeding and there is no evidence that the suffering is done for any other reason except to prefer, then the intent to prefer must be inferred: *In re Cohen.* (2) The Master of the Rolls said that in all cases it was a question of fact what was the proper inference to be drawn, but *Sharp* v. *Jackson* (3) shows that is not so. The liquidator has established that the debtor company realized that if it was represented in the application of the respondents for an extension of time the Court ought to be informed of the imminence of the liquidation of the company and that Sir Arthur Wheeler the day before, on March 3, 1931, had become bankrupt.

[LORD TOMLIN. If the judge had known those facts he might have thought them all irrelevant and he could exercise his judicial discretion.]

*Tucker K.C.* The Court of Appeal said that the statement in the headnote of *In re Cohen* (2) was wrong.

[LORD WARRINGTON (a party to that decision). I think the headnote goes beyond the actual decision.]

*Tucker K.C.* The agent of the company well knew it was on the verge of liquidation and that the reasonable and necessary consequence of not opposing the application was that the order would be obtained, therefore the withdrawal of the opposition was with a view to preferring the respondents.

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(1) [1933] Ch. 542.

(2) [1924] 2 Ch. 515.

(3) [1899] A. C. 419.

[LORD TOMLIN. But you must show that in law the result would have been different if the company had been represented. and that the judge in his judicial discretion must have then decided differently.]

*Tucker K.C.* Before the judge can exercise his discretion he must first be satisfied that the omission to register was accidental, and the Courts would receive evidence as to the financial position of the company: *In re Cardiff Workmen's Cottage Co.* (1) It is sufficient if the evidence is that Mr. Wheeler procured the company's staying away from the hearing of the application when he believed that if it had been represented the order would have been refused: *In re Bootle Cold Storage and Ice Co.* (2); *In re E. & F. Beattie, Ld.* (3); *In re Pix. Plomley* v. *Stileman.* (4) Sect. 265 of the Companies Act, 1929, should be read "Any judicial proceeding relating to property which would if done against an individual be deemed in his bankruptcy a fraudulent preference" and then one must go to s. 44 of the Bankruptcy Act, 1914, to find out if any judicial proceeding done or suffered by an individual can be deemed to be a fraudulent preference.

There is no evidence one way or the other as to the reasons for the withdrawal of opposition by the debtor company, therefore the ordinary rule is applicable—namely, that a man must be taken to intend the result of his acts, and the withdrawal resulted in the order being obtained. It is admitted that the onus is on the appellant to prove that the intention of the withdrawal was that the order should go through. *Ex parte Lancaster. In re Marsden.* (5) It is not necessary that there should be a preference in fact; it is merely necessary to show that it was done with a view to prefer.

[LORD TOMLIN. There is no evidence of motive at all.]

*Tucker K.C.* But there is evidence on which the inference is that when Mr. Wheeler gave instructions for the withdrawal of opposition he believed he could prevent the order being made, therefore the withdrawal infers that he wished the Trust to get the order. On the first occasion when the matter came before the Court it was ineffective and merely stood over, and before the actual hearing a few days afterwards the withdrawal took place of the company. The brief was in fact put into the hands of counsel before the case was first before the Court.

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(1) [1906] 2 Ch. 627.
(2) [1901] W. N. 54.
(3) [1901] W. N. 152.
(4) [1901] W. N. 165.
(5) (1883) 25 Ch. D. 311.

[LORD MACMILLAN. You must show what was the view of the M. I. G. Trust in withdrawing instructions to oppose : that that is necessary is clear from what Bowen L.J. said in his judgment in *Ex parte Hill. In re Bird.* (1)]

*Tucker K.C.* It was obviously expected that the opposition by the company would be effective to prevent an order being obtained. There was at the same time as the opposition was withdrawn a withdrawal of the proposed voluntary liquidation of the company. The opposition was to be made because the company was about to go into liquidation. [He referred to Buckley (Lord Wrenbury) on the Companies Acts, 11th ed., p. 542, as to the effect of winding-up on antecedent and other transactions.]

*W. P. Spens K.C.* and *C. N. Tindale Davis* were present on behalf of the respondents, but were not called on.

The House took time for consideration.

March 27. LORD TOMLIN. My Lords, the appellant is the liquidator of a company called M. I. G. Trust, Ld., which is being wound up compulsorily by the Court under an order dated March 31, 1931. I shall hereafter refer to M. I. G. Trust, Ld., as the debtor company. The respondents are a limited company claiming to be secured creditors of the debtor company by virtue of a charge created by deposit of deeds on May 6, 1930, and registered with the Registrar of Companies on March 10, 1931, as the result of an order extending the time for registration made by Maugham J. on that day.

This appeal arises out of a summons issued by the appellant under s. 265 of the Companies Act, 1929, for a declaration that the proceedings before Maugham J. and the order made by him (being proceedings alleged to have been suffered by the debtor company with a view to prefer the respondents) constituted an undue and fraudulent preference of the respondents over the other creditors of the debtor company and for consequential relief. For many years prior to March 3, 1931, the business of an outside stockbroker under the style of Arthur Wheeler & Co. was carried on, up to 1920, by one Sir Arthur Wheeler alone, and thereafter by him in partnership with one George Victor Smith. The debtor company was formed in 1910 by Sir Arthur Wheeler for the purpose of carrying on the business of buying and selling stocks and shares in association with the business of Arthur Wheeler & Co. Sir Arthur Wheeler and his son (hereafter called Mr. Wheeler) were the only two directors of the debtor company from October, 1930, to March 3, 1931, a third director, Mr. Leeson, having retired in October, 1930. The respondents are a public limited company. During the year 1930 and in the year 1931, up to March 3, Sir Arthur Wheeler was chairman of the board of directors of the respondents. At all material times Mr. Wheeler was managing director of the respondents. A substantial number of shares in the capital of the respondents were held by Sir Arthur Wheeler, his wife and Mr. Wheeler. On May 6, 1930, the debtor company deposited the title deeds of certain freehold property with the respondents as security for money owing from the debtor company to the respondents. Such deposit was accompanied by a letter dated May 6, 1930, from the debtor company to the respondents in which the debtor company agreed to execute any necessary deed in respect of the properties charged, when called upon to do so.

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(1) (1883) 23 Ch. D. 695, 704.

Particulars of the charge were not sent to the Registrar of Companies for registration, pursuant to s. 80, Companies Act, 1929, within 21 days after the date of the creation of the charge, and such charge, in consequence, became void against the liquidator and any creditors of the company by reason of the provisions of s. 79 of the Companies Act, 1929.

On March 3, 1931, the firm of Arthur Wheeler & Co. was adjudicated bankrupt. Immediately after the adjudication Mr. Wheeler consulted the solicitors of the debtor company as to the position of that company, and the solicitors prepared draft resolutions for voluntary winding-up. On March 4, 1931, the respondents instituted proceedings in the High Court of Justice Chancery Division by way of originating notice of motion under the provisions of s. 85 of the Companies Act, 1929, for an order that the time for delivering particulars of the charge for registration should be extended, on the ground that the omission to deliver such particulars was accidental. The notice of motion was addressed to the debtor company. On March 4, 1931, Mr. Wheeler instructed the solicitors of the debtor company to bring to the notice of the court his connection with the respondents and the debtor company, the transactions between the two companies and the position of the debtor company. The solicitors accordingly instructed counsel, delivering to him a brief which, after referring to the bankruptcy of Arthur Wheeler & Co. and the position of Mr. Wheeler, contained (inter alia) the following statements: "(1.) That Mr. Wheeler was confident that in the circumstances which had happened the debtor company must be put into liquidation, either on its own petition, or following resolutions for its voluntary winding-up, and that it would probably present its own petition. (2.) That the respondents had from time to time loaned very large sums of money to the debtor company, the debtor company depositing various securities with the respondents. (3.) That Mr. Wheeler's instructions were that he was merely a nominal director of the debtor company and knew nothing of its operations, except as to the transactions involving the loans to the debtor company by the respondents, and that counsel would appreciate that Mr. Wheeler's position was a somewhat difficult one. (4.) That the creditors of the debtor company, of which there were a very large number, would undoubtedly be prejudiced if the respondents were permitted to register the charge, and that Mr. Wheeler felt that these facts should be brought to the knowledge of the court on the application by the respondents."

On March 6, 1931, the respondents' application came before Maugham J. The debtor company appeared by counsel and the application was adjourned until March 10, 1931. On March 7, 1931, Mr. Wheeler signed and sent to the solicitors of the debtor company a letter which, omitting immaterial parts, was in the following terms : "On behalf of the M. I. G. Trust, Ld., we withdraw any instructions given to you in respect of either the proposed liquidation of the company or the opposition to the registration of the charge given in favour of the Gresham Trust, Ld.

Yours faithfully, for M. I. G. Trust, Ld."

On March 10, 1931, the respondents' application came again before Maugham J. The debtor company did not appear by counsel. Maugham J., upon the evidence of two affidavits of the respondents' secretary, was satisfied that the omission to register had been accidental, and made an order, the operative part of which was as follows : "This court being satisfied that the omission to register the mortgage or charge created by deposit of deeds on 6th May, 1930, by the respondents M. I. G. Trust, Ld., in favour of the applicants within the time required by the Companies Act, 1929, was accidental, doth, pursuant to the 85th section of the said Act, order that the time for registration of the particulars of the said mortgage or charge be extended until 24th March, 1931. But this order is to be without prejudice to the rights of parties acquired prior to the time when such mortgage or charge shall be actually registered."

On the same day that the order was made the charge was registered.

The appellant does not suggest that the omission to register the charge in May, 1930, was otherwise than accidental, nor does he suggest that there was any collusion between the respondents and the debtor company in connection with the application to extend the time for registration or the making of the order thereon. On March 18, 1931, a petition was presented by the debtor company and a contributory and a creditor of the debtor company for an order for the compulsory winding up of the debtor company. On March 31, 1931, an order was made on this petition for the compulsory winding up of the debtor company and by an order dated May 7, 1931, the appellant was appointed liquidator in the winding-up. On June 22, 1932, the appellant issued the summons originating the proceedings out of which this appeal arises. On November 6, 1932, Eve J. made an order declaring that the proceeding suffered by the debtor company in which the order extending the time for registration was made was a fraudulent preference of the respondents over the other creditors of the debtor company and that the charge was void against the appellant and the creditors of the debtor company. On February 28, 1933, the Court of Appeal unanimously reversed this decision, holding that the appellant had not proved that the proceeding was suffered by the debtor company with a view of giving the respondents a preference over the other creditors of the debtor company.

The sections upon which the appellant relies are s. 265 of the Companies Act, 1929, and s. 44 of the Bankruptcy Act, 1914. The material parts of s. 265 of the Companies Act, 1929, are as follows: "265.—(1.) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property which would, if made or done by or against an individual, be deemed in his bankruptcy a fraudulent preference, shall, if made or done by or against a company, be deemed, in the event of its being wound up, a fraudulent preference of its creditors, and be invalid accordingly. (2.) For the purposes of this section the commencement of the winding up shall be deemed to correspond with the presentation of the bankruptcy petition in the case of an individual."

Sect. 44 of the Bankruptcy Act, 1914, is in the following terms: "44.—(1.) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy. (2.) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt. (3.) Where a receiving order is made against a judgment debtor in pursuance of section one hundred and eight of this Act, this section shall apply as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order."

Now it is to be observed that the appellant in order to succeed has to establish the validity of a number of propositions of law and fact, including the following: (1.) that a judicial proceeding such as the application to extend the time for registration if suffered by a company unable to pay its debts as they become due out of its own money in favour of any creditor within the meaning of s. 44 of the Bankruptcy Act, 1914, is an act relating to property within the meaning of s. 265 of the Companies Act, 1929; (2.) that what occurred in the present case was a suffering by the debtor company in favour of the respondents of a judicial proceeding within the meaning of s. 44; (3.) that such suffering (*a*) was done with a view of giving the respondents a preference over the other creditors of the debtor company and (*b*) did result in such a preference being given.

Each member of the Court of Appeal has been content to assume an answer in the appellant's favour to each of the first two of the foregoing propositions, because they decided against him on the third proposition and without success on the third proposition success on the first two propositions would avail the appellant nothing. My Lords, I too am prepared to make the same assumptions, but in doing so I do not indicate any opinion upon the merits of either of the propositions, the validity of which I assume.

There remains, therefore, to be considered whether the Lords Justices in the Court of Appeal reached a right conclusion upon

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the third proposition. In my opinion they did. It is necessary for the appellant to establish that the debtor company suffered the judicial proceeding with a view to giving a preference. Now a limited company cannot have a view except so far as the views of the agents by which it acts are to be deemed the views of the company. That means in the present case that the state of Mr. Wheeler's mind has to be examined, as it is only through him that any view can be attributed to the debtor company. Of the state of Mr. Wheeler's mind there is no evidence except such as is afforded by his actions regarded in the light of the circumstances in which he was placed. The circumstances in which he was placed were (1.) that in addition to his knowledge of the position of the debtor company as indicated in his instructions to the debtor company's solicitors he knew all the facts with regard to the loan by the respondents to the debtor company; (2.) that he knew that the charge given by the debtor company had by reason of an accidental omission not been registered and that it ought to have been registered; and (3.) that he was both the managing director of the respondents and a director of the debtor company and consequently owed a duty to each of them, though the two duties might be conflicting.

His actions so far as material were (1.) that immediately after the adjudication of Sir Arthur Wheeler as a bankrupt he gave to the solicitors of the debtor company instructions to prepare a resolution for the voluntary winding-up of the debtor company and also the instructions as to the respondents' application which resulted in the preparation and delivery of the brief which has been mentioned and (2.) that on the day after the preliminary hearing of the respondents' application he withdrew the instructions both as to the voluntary winding-up and as to the respondents' application. Now upon the assumption that the direct and necessary result of the withdrawal of the instructions in relation to the respondents' application was that an order extending the time for registration which would not otherwise have been made was made, it is still essential for the appellant to prove that Mr. Wheeler acted with a view to giving the respondents a preference over the other creditors of the debtor.

It is contended on the appellant's behalf that once given the withdrawal and the consequences of the withdrawal, then in the absence of any other explanation the intent to prefer must be inferred, because a man is presumed to intend the natural consequences of his act. My Lords, I do not accept this contention. In my opinion in these cases the onus is on those who claim to avoid the transaction to establish what the debtor really intended, and that the real intention was to prefer. The onus is only discharged when the court upon a review of all the circumstances is satisfied that the dominant intent to prefer was present. That may be a matter of direct evidence or of inference, but where there is not direct evidence and there is room for more than one explanation it is not enough to say there being no direct evidence the intent to prefer must be inferred. In my opinion there is nothing in the decision in *In re Cohen* (1) to justify the doctrine for which the appellant contends, and I do not think that such a doctrine could be reconciled with the opinion expressed in your Lordships' House in the case of *Sharp* v. *Jackson* (2), and in particular with the views indicated by Lord Halsbury at pp. 421 and 422 of the report. I may add that I do not think that the headnote in the case of *In re Cohen* (1) accurately expresses the result of the decision in the Court of Appeal. The majority of the Court held that upon the evidence the intent to prefer was made out, but it is only in the judgment of Sargant L.J. that any support can be found for the headnote as expressed.

In the present case it is plain in my judgment that Mr. Wheeler's action may have been due to reasons unconnected with any intention to prefer. He may for example have come to the conclusion that his position *vis-à-vis* the two companies was such that he could not fairly take an active part in what was done. It is improper to speculate what the reasons for his actions were, and in my opinion upon the material available the inference that the intent was to prefer cannot in law properly be drawn. I think the appellant failed to make out his case upon the evidence in this respect. This conclusion renders it unnecessary to consider whether the withdrawal of the brief resulted in the order being made and a preference being given to the respondents. This matter has been dealt with below by Romer L.J., but I think that as it is unnecessary so it is inadvisable to express any opinion upon it.

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(1) [1924] 2 Ch. 515.

(2) [1899] A. C. 419.

I invite your Lordships for the reasons which I have indicated to dismiss this appeal with costs.

My Lords, I am authorized to say that my noble and learned friend Lord Warrington of Clyffe concurs in the opinion which I have just expressed.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur in that opinion and have nothing further to add.

LORD MACMILLAN. My Lords, I also concur.

LORD WRIGHT. My Lords, I agree.

*Order of the Court of Appeal affirmed and appeal dismissed with costs.*

*Lords' Journals*, March 27, 1934.

Solicitors for the appellant: *Mayo, Elder & Rutherfords.*

Solicitors for the respondents: *Clifford-Turner Hopton & Lawrence.*

[HOUSE OF LORDS.]

H. L. (E.)* WIGGINS (INSPECTOR OF TAXES) . . . . APPELLANT;

1933 AND

Feb. 21. TRUSTEES OF F. G. M. WATSON (A MINOR) RESPONDENTS.

*Revenue—Income Tax—Settlement—Covenant by Settlor to pay annuity in trust for Child—Power to revoke trust with consent—Annuity, whether for period less than life of Child—Income of Child for purposes of Income Tax—Finance Act*, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 20, *sub-s.* 1.

By s. 20, sub-s. 1 (*c*), of the Finance Act, 1922: "Any income . . . . (*c*) which by virtue or in consequence of any disposition made . . . . by any person after April 5, 1914, is payable . . . . for the benefit of a child of that person for some period less than the life of the child; shall . . . . so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income" either of a person whose rights were not in question "or of the person, if living, by whom the disposition was made" . . . . :—

*Held*, that an annuity paid by a settlor to the trustees of the settlement in trust for the infant child of the settlor during the life of the infant, but subject to a power of revocation by the settlor with the consent of one of several named persons, was not income payable to the infant "for any period less than the life" of the infant within the above enactment.

Order of the Court of Appeal [1933] 1 K. B. 245 affirmed.

APPEAL from an order of the Court of Appeal (1) dismissing an appeal from an order of Rowlatt J. upon a case stated for the opinion of the King's Bench Division by the Commissioners for the General Purposes of the Income Tax Acts for the Division of West Brixton in the County of Surrey under ss. 27 and 149 of the Income Tax Act, 1918.

The only question upon which the opinion of the Court was desired was whether sums received by trustees under a settlement during the year ended April 5, 1931, were income of a beneficiary for the purpose of computing the allowances and deductions to which the beneficiary was entitled under the relevant statutory provisions for that year.

The settlement was dated March 5, 1930, and was made between Frederick Percy Watson (hereinafter referred to as "the settlor") of the one part and Bernard Burton, Gordon

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* *Present:* LORD BUCKMASTER, LORD WARRINGTON OF CLYFFE, LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

(1) [1933] 1 K. B. 245.

Dabell and Shirley Worthington Woolmer (hereinafter referred to as "the present trustees") of the other part. After reciting that the settlor was desirous of making provision for his son Francis Greville Melmose Watson the beneficiary, who was born on November 26, 1916, the settlor covenanted with the present trustees that he would during the joint lives of himself and the beneficiary pay the present trustees (or other the trustees of the said settlement) an annuity of 350*l.* to be paid by equal quarterly instalments on the usual quarter days, the first instalment to be paid on March 25, 1930.

It was by the said settlement declared that the present trustees or other the trustees for the time being should stand possessed of the annuity in trust for the beneficiary with the same power during his minority to apply the annuity for or towards his maintenance education and benefit as the trustees would have if the annuity were income of property vested in them upon trust for the beneficiary for an absolute interest. It was further declared that as long as the law allowed the trustees should accumulate and invest any income not applied by them as aforesaid in any trust securities for the time being but with power at any time to resort to the accumulations and to apply the same as though they were current income.

It was provided by the indenture that the settlor might at any time or times thereafter by deed or deeds revocable or irrevocable with the consent of any one of the following persons, namely the present trustees Aubrey Arthur Woolmer (since deceased) and Kenneth Anns, revoke in whole or in part the trusts and powers declared by and contained in the indenture and appoint any new or other trusts powers and provisions in lieu thereof and that nothing in the indenture contained should oblige the trustees to take action to enforce the covenant by the settlor therein contained unless and until special notice had been given to the trustees by or on behalf of the beneficiary and reasonable security had been given to them for the costs of any such proceedings.

The settlor duly paid to the present trustees the instalments of the said annuity payable under the indenture during the year ending on April 5, 1931. They amounted to 350*l*. From each instalment he deducted income tax at the rate of 4*s*. 6*d*. in the pound amounting to 78*l*. 15*s*., and the net sum of 271*l*. 5*s*. was received by the present trustees. For the period from March 5, 1930 (the date of the settlement), to March 25, 1930, the settlor duly paid to the present trustees a proportionate part of the instalment due on March 25, 1930, amounting to 19*l*. 8*s*. 10*d*. and deducted therefrom 3*l*. 7*s*. 5*d*. income tax at the rate of 4*s*. in the pound, and the net sum of 15*l*. 11*s*. 1*d*. was received by the present trustees. It was not disputed that the instalments so paid were paid out of profits and gains brought into charge to tax, or that (subject to the question arising in this case) the sums deducted for income tax from the instalments were lawfully deducted.

On July 15, 1931, the beneficiary through the present trustees lodged with the Inspector of Taxes a claim for relief from and repayment of income tax in respect of the tax so deducted from the instalments of the annuity as aforesaid on the footing that the instalments paid to the trustees during the said year were his income.

The Inspector of Taxes objected to the claim on the ground that the income must be regarded as the income of the settlor and not that of the beneficiary in that it was payable for some period less than the life of the beneficiary within the meaning of s. 20, sub-s. 1 (*c*), of the Finance Act, 1922. (1)

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(1) Finance Act, 1922, s. 20, sub-s. 1:—" Any income—

(*a*) of which any person is able, or has, at any time since April 5, 1922, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation or otherwise howsoever by virtue or in consequence of a disposition made directly or indirectly by himself, to obtain for himself the beneficial enjoyment; or . . . .

(*c*) which by virtue or in consequence of any disposition made, directly or indirectly, by any person after April 5, 1914, is payable to or applicable for the benefit of a child of that person for some period less than the life of the child;

shall, subject to the provisions of this section, but in cases under the above paragraph (*c*) only if and so long as the child is an infant and unmarried, be deemed for the purposes of the enactments relating to income tax (including super-tax) to be the income of the person who is or was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, as the case may be, and not to

The settlor had not exercised either wholly or in part the power of revocation reserved to him.

The trustees contended :—

(1.) That the instalments paid under the settlement were income of the beneficiary for the year of claim and were not income of the settlor.

(2.) That the fact that a power to revoke (not exercised) with the consent of the person named in the settlement was reserved to the settlor did not prevent the income from being income of the beneficiary.

The Inspector of Taxes contended :—

(1.) That by reason of the power of revocation the annuity was payable to or for the benefit of the said Francis Greville Melmose Watson for some period less than his life within the meaning of s. 20, sub-s. 1 (*c*).

After hearing the trustees and the Inspector of Taxes the Commissioners for the General Purposes of the Income Tax disallowed the claim of the trustees, but stated for the opinion of the King's Bench Division a special case which set out the foregoing facts and contentions.

The special case was heard by Rowlatt J., who decided in favour of the trustees. The Commissioners appealed to the Court of Appeal, and that Court (Lord Hanworth M.R. and Slesser and Romer L.JJ.) affirmed the decision of Rowlatt J. and dismissed the appeal. (1)

The Inspector of Taxes appealed to this House.

be for those purposes the income of any other person : . . . .

Provided also that—

(i) the above paragraph (*c*) shall not apply as regards any income . . . . which is payable to or applicable for the benefit of a child during the whole period of the life of the person by whom the disposition was made ; and

(ii) for the purposes of the said paragraph (*c*) income shall not be deemed to be payable to or applicable for the benefit of a child for some period less than its life by reason only that the disposition contains a provision for the payment to some other person of the income in the event of the bankruptcy of the child, or of an assignment thereof, or a charge thereon being executed by the child."

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1933. Feb. 21. *Sir Thomas Inskip A.-G.*, *J. H. Stamp*, and *Reginald Hills* for the appellant. It is not contended that the annuity is payable " for a period less than the life of the child " because it is payable during the joint lives of the child and the settlor ; for that contention is precluded by proviso 1 to s. 20. What is submitted is that income for the life of a beneficiary means prima facie a vested interest in possession or at least in reversion ; a defeasible interest is less than a vested interest and a revocable interest is similarly less than a vested interest, and therefore less than a life interest in the ordinary sense of the expression ; in other words it is an interest payable or applicable for a period less than the life of the beneficiary. If so it is to be deemed to be the income of the settlor and the beneficiary or his trustees may recover the amounts deducted for income tax.

[*Levitt* v. *Inland Revenue Commissioners* (1) was referred to.]

*Latter K.C.*, *Gavin Simonds K.C.*, and *Cyril King* were present on behalf of the respondents, but not called on.

At the conclusion of the argument for the appellants their Lordships delivered judgment as follows :—

LORD BUCKMASTER. My Lords, this question arises out of a settlement that was executed on March 5, 1930, by one Frederick Percy Watson. It is an unusual document ; by it he covenanted with certain trustees that he would, during the joint lives of himself and his named son, pay to the trustees an annuity of 350*l.* a year to be held by them in trust for the settlor's son and so that while he was a minor they should have power to provide for his maintenance, education and benefit, with power to accumulate the income that was not used. There was nothing further in the deed relating to the disposition of this annuity, but it contained a final proviso to the effect that the settlor might at any time or times by deed or deeds revocable or irrevocable with the consent of any one of five persons, of whom two were the trustees, revoke in whole or in part the trusts and powers declared by and contained in the deed, and appoint any new or other trusts, powers, and provisions in lieu thereof.

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(1) 1932 S. C. 629.

The annuity was duly paid and, being paid out of moneys from which income tax had been deducted, the trustees applied for repayment of the tax on behalf of the infant child. This application was disallowed by the General Commissioners, whose decision was reversed by Rowlatt J., and the judgment of the learned judge was in terms affirmed by the Court of Appeal, from whom this appeal proceeds.

The ground upon which the Crown base their claim is this: They say that, by reason of the fact that the settlement contains a power of revocation, its provisions make the annuity applicable for the benefit of the child of the settlor for some period less than the life of the child, and that consequently it is brought within the operation of s. 20, sub-s. 1, of the Finance Act, 1922.

My Lords, in order to see whether that is the true meaning of that sub-section, it is necessary to examine the whole section in which the sub-section is to be found. It provides that in three definite cases the income under a settlement shall, for the purposes of the enactments relating to income tax, be deemed to be the income of the person who was able to obtain the beneficial enjoyment thereof, or of the person, if living, by whom the disposition was made, and not to be for income tax purposes the income of any other person. Now the three cases in which that result arises are quite separate and distinct. The first clause (*a*) is one in general terms relating to dispositions whenever made, and it provides that the income of which any person is able, or has, at any time since April 5, 1922, been able, without the consent of any other person by means of the exercise of any power of appointment, power of revocation, or otherwise, to obtain for himself the beneficial enjoyment, is deemed to be his income. Your Lordships will appreciate the fact that that sub-section applies impartially, whoever the beneficiary may be and however long the period of time of his enjoyment may be, or whenever the deed has been executed. Nothing more is necessary, in the case of a person who is able without the consent of any other person by the exercise of a power of revocation or appointment to obtain for himself the beneficial enjoyment; in such a case the income, however disposed of, has to be treated for the purposes of super-tax (1) as income of the person in whom that power resides. That sub-section cannot apply in the present case since here the power of revocation can only be exercised with consent. Clause (*b*) is a totally different one; that provides for the case where, by a document executed after May 1, 1922, other than a document that is made for valuable and sufficient consideration, income is payable to or applicable for the benefit of any other person for a period that cannot exceed six years: it may apply to any persons; it is not limited in any way to children, but the whole thing depends upon the period of six years, which is the limit of time within which this deed must operate. The final one is cl. (*c*), which, if words that are not important are omitted, provides for the case where by virtue of any disposition made by any person after April 5, 1914, income is payable to or applicable for the benefit of a child of that person for some period less than the life of the child; and this clause contains no reference to any power of revocation.

In this case the money was limited for the joint lives of the child and the father, and that upon the face of it might appear to show that it was for a period less than the life of the child within the meaning of the sub-section; but the Crown have assented to the view that a later provision in the section excludes this construction.

The point, and the only point that has been hitherto argued, and upon which the opinion of this House has been invited, is whether or not the mere fact that there is a power of revocation contained in the deed ensures that the limitations of the interest are for a less period than the life of the child. My Lords, I am unable to follow that argument any more than were the other learned judges before whom it has been advanced. If you disregard wholly, as the Crown are prepared to do, the fact that this is a limitation for joint lives and consider it merely as a limitation for one life, it appears to me that it is impossible to say that it is for a period less than the life of the child merely because there is a means by which the actual estate that is conferred may be terminated and cut short. The limitation is for the life of the child, subject to a power which enables the limitation itself to be set aside, but that does not prevent the limitation while it lasts and is not set aside being for the life of the child. I am strongly confirmed in that view by the contrast between sub-ss. (*c*) and (*a*). It is quite plain that whoever was drafting this section realized entirely what might happen if a person had a power of revocation ; and, where the deed is dealing with any beneficiary, whether related or not to the settlor, and there is a general power of revocation without the consent of any person, special provisions are made to meet that case, provisions which would have affected the present case but for the fact that the power of revocation which is referred to in sub-s. (*a*) is one that must be exercised without the consent of any other person, while here the power of revocation can only be exercised with the consent of one of five named persons.

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(1) Or sur-tax, as it is now called since the passing of the Finance Act, 1927 (17 & 18 Geo. 5, c. 10).

My Lords, these reasons satisfy me that in sub-s. (*c*) it was never intended that a limitation for the life of a child should be regarded as a limitation for less than that period by reason of the introduction of a power of revocation which would enable the whole of the provisions to be destroyed ; and this is in accordance with the opinion of the Court of Appeal, whose judgment on this point should, I think, be affirmed.

LORD WARRINGTON OF CLYFFE. My Lords, I am of the same opinion.

LORD TOMLIN. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I am of the same opinion, although I have grave doubts whether, upon the actual framework of the settlement here in question, the case falls at all within the provisions of sub-s. (*c*) ; but, upon the

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assumption that it does, I entirely concur in the motion which has been proposed.

LORD WRIGHT. My Lords, I agree.

*Order of the Court of Appeal affirmed, and appeal dismissed with costs.*

*Lords' Journals*, Feb. 21, 1933.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Shirley Woolmer & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1934
*March* 8.

PEARSON . . . . . . . . . . . APPELLANT;

AND

GEE AND BRACEBOROUGH SPA, LIMITED (IN LIQUIDATION) . . . RESPONDENTS.

*Landlord and Tenant—Underlease—Company—Forfeiture on liquidation—Winding-up Order—Action for relief from forfeiture—Action begun within year of commencement of winding up—Action not heard till after expiration of year—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 1, 2, 10 (*b*).

Sub-s. 10 of s. 146 of the Law of Property Act, 1925, provides that where there is a condition of forfeiture contained in a lease (subject to exceptions not here applicable) on the bankruptcy of the lessee (and under s. 205 "bankruptcy" includes in the case of a company, liquidation) then (*b*) if the lessee's interest is not sold within one year from the bankruptcy the section, which gives the lessee the right to apply for relief from forfeiture, only applies to such a forfeiture condition during the first year from the date of the bankruptcy or liquidation.

The respondent company was underlessee subject to a condition of forfeiture if the company went into liquidation. A compulsory winding-up order was made and the company's interest was not sold within one year of its winding up, but within that year proceedings were commenced for relief from forfeiture which, however, were not before the Court until after the expiration of the year.

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* *Present:* LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

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*Held*, that during the year the section operated and if the application for relief was made during the year, the jurisdiction of the Court to deal with the application did not cease, because the application was not dealt with before the year expired and therefore sub-s. 10 (*b*) was applicable.

Decision of the Court of Appeal (reported sub nom. *Gee* v. *Harwood* [1933] Ch. 712) affirmed.

APPEAL by the defendant in the action from the order of the Court of Appeal (Lord Hanworth M.R., Lawrence and Romer L.JJ.) affirming the judgment of Luxmoore J. in favour of the respondents (plaintiffs in the action). (1)

At the time of the commencement of the action in which the judgment and order were made, and until February 23, 1932, the appellant was an unmarried lady named Edith Gertrude Harwood, Spinster, but on that date married F. G. W. Pearson.

The respondent company was incorporated in 1927, for the purpose of establishing and carrying on the business of a Spa and of a dealer in natural mineral and other waters of a health-giving character. For the purpose of carrying on its business of the development of Braceborough Spa as a Spa the company took an underlease dated September 10, 1928, from the appellant of certain land at Braceborough with the erections thereon and known as Braceborough Spa for the term of fifty years (less one month) from March 25, 1927, at a rent or royalty of one penny per quart bottle of the natural water sold and of one halfpenny per gallon on such water sold in bulk. And it was thereby provided that if the company should go into liquidation other than voluntary it should be lawful for the lessor to re-enter upon the demised premises.

On May 22, 1930, a petition to wind up the company was presented by a judgment creditor for 2903*l.* 15*s.*; and by order dated June 2, 1930, the company was ordered to be wound up by the Court under the provisions of the Companies Act, 1929.

The respondent G. C. G. Gee proved against the company in its winding up for 6650*l.* cash advances made by him to the company, and was co-plaintiff with the company. The writ in the action was issued on October 23, 1930, but could not be served until March 17, 1931, owing to the absence of the appellant abroad. The statement of claim was delivered on April 4, 1931, and the respondents thereby claimed (1.) a declaration that the underlease was subsisting and that the company was entitled to retain possession of the demised premises; (2.) in the alternative, relief from any forfeiture of the underlease on equitable terms; and (3.) a declaration that the company was at liberty to assign the premises to the respondent Gee.

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(1) [1933] Ch. 712.

The appellant pleaded that on October 24, 1929, she, by re-entry for non-payment of rent due on September 29, 1929, determined the underlease, and by her counterclaim, claimed alternatively that the underlease was determined on June 2, 1930, when the company went into compulsory liquidation. There were concurrent findings in both courts below that the appellant did not take possession of the premises until, if at all, after the making of the winding-up order and then without any leave of the court.

The action was tried by Luxmoore J. on January 26, 27, 28 and 29, and February 2, 3 and 15, 1932, and by his judgment he held (inter alia) (1.) that on the facts the underlease had not been determined before the winding-up order; (2.) that the underlease was not a lease of mines or minerals or of property in respect of which the personal qualifications of the tenant were of importance for the preservation or character of the property so as to bring the case within s. 146, sub-s. 9, of the Law of Property Act, 1925; (3.) that the property demised had not been sold by the company within one year from the order winding up the company; (4.) that as the proceedings for relief had been commenced within a year of the winding-up order it was within the discretion of the Court to grant relief from forfeiture on such terms as it thought fit having regard to sub-ss. 2 and 10 (*b*) of s. 146, although the proceedings for relief did not come on for hearing till after the year had expired and he granted a relief on terms.

The Court of Appeal held (1) (1.) that there had been no re-entry by the appellant for non-payment of rent before the date of the winding-up order; (2.) that the court had jurisdiction under the Law of Property Act, 1925, s. 146, to grant relief, as the case fell within sub-s. 10 (*b*) of the section, which entitled the liquidator of the company to apply for relief within a year of the commencement of the winding up, when the demised property had not been sold; and (3.) that Luxmoore J. had granted relief on proper terms.

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(1) [1933] Ch. 712.

The appellant appealed against the finding of facts by Luxmoore J. and on the question of the true construction of s. 146. The House dismissed the appeal on the question of fact. That decision is not the subject of this report.

*P. Gordon Bamber* and *R. L. Daniell* for the appellant.

[After dealing with the correctness or otherwise of the findings of fact counsel argued on the construction of s. 146.]

*P. Gordon Bamber.* The company when it started its action for relief from forfeiture was within its rights, but the power to grant relief under s. 146, since the lessee's interest was not sold within one year from the date of the order to wind up—namely, May 22, 1930, expired on May 22, 1931. Therefore at the time of the hearing before Luxmoore J. he had no jurisdiction to grant the relief which he gave. Luxmoore J. might have had jurisdiction if, for example, within the year an agreement for the sale of the demised premises had been entered into, but the sale had not been effected by the time of the hearing of the action for relief, nor was a contract for sale effected at the time when relief was granted.

*Upjohn K.C.* and *Harold Christie* being present for the respondents were not called on.

LORD TOMLIN. My Lords, this is an appeal by a lessor against an order of the Court of Appeal (Lord Hanworth M.R., and Lawrence and Romer L.JJ.) affirming a judgment of Luxmoore J. under which he granted to the lessee relief against forfeiture in respect of a property comprised in an underlease, under s. 146 of the Law of Property Act, 1925. The appeal is based, in effect, on two grounds: It is an appeal against the

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findings of fact of the learned judge, and it is an appeal on a question as to the construction of the section.

So far as the facts are concerned, the appeal is a hopeless appeal. The appellant alleged that she had re-entered upon the premises under the power of re-entry in the lease, before the respondent company, the lessee, had been compulsorily wound up. The order to wind up the company was made on June 2, 1930, upon a petition presented on May 22, and she sought to show that she had been in possession before the commencement of the liquidation. In fact, the learned judge found, and the Court of Appeal affirmed the finding, that she had conspired with one Kellow, who was the secretary of the company, to concoct a number of letters with a view of producing the impression that she had entered into possession when she had done nothing of the kind. She and her witness Kellow were both disbelieved by the judge, and the witness for the other side on the material issues in this regard, a man of the name of Holmes, was believed. The Court of Appeal reached the conclusion that the learned judge had arrived on the facts at the right result, and in the circumstances of this case, it is hopeless to ask this House to reverse that decision, when, in fact, there was indicated to us nothing of a cardinal nature as having been overlooked or misapplied. Indeed, but for the point of law, with which I will deal next, it would be difficult to say that this appeal was a proper appeal to bring before this House at all.

The point of law arises upon s. 146 of the Law of Property Act, 1925. Under sub-s. 1 of that section: "A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice" and under sub-s. 2: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief." Under sub-s. 10: "Where a condition of forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest is contained in any lease, other than a lease " of certain excepted classes, " then : (*a*) if the lessee's interest is sold within one year from the bankruptcy or taking in execution, this section applies to the forfeiture condition aforesaid ; (*b*) if the lessee's interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy or taking in execution."

Now it is accepted in the present case that, after the winding-up order, the appellant did enter into physical possession of the property and was seeking to assert her right as landlord to re-enter ; and the liquidator eventually, in October, 1930, turned her out and commenced an action for relief. In that action, she presented a counterclaim asking for certain relief, which for the moment, it is not material to consider. That action and counterclaim in fact were not heard until after the expiration of the year from the commencement of the liquidation, that is to say, they were not heard until after May 22, 1931.

The point which is made on behalf of the appellant upon the section is that upon the true construction of the section, although at the time when the action was launched it was open to the company to apply for relief, yet, inasmuch as the lessee's interest was not sold within one year from May 22, 1930, the power to grant relief under the section expired on May 22, 1931, with the result that when the matter came before the learned judge, he had no jurisdiction to grant the relief which he gave.

That is the way in which the case is presented. That, of course, turns upon the language which has been employed in the section. It is to be noted that, if that be the true effect of the section, it would appear that if an application for relief were made within a year and were within the year granted, but before the expiration of the year the lessee's interest were not sold, the order which had already been made would apparently become void. My Lords, in my opinion it is impossible to put upon the section the meaning which it is sought to attribute to it. It seems to be reasonably plain that what sub-s. 10 of s. 146

does is to provide that where in any lease, with the exception of the excepted leases, there is a condition of forfeiture on bankruptcy (and under s. 205 " bankruptcy " includes, in the case of a company, liquidation), then if the lessee's interest is sold within one year, the section continues to apply both in and after the year ; but if the lessee's interest is not sold before the expiration of the year, at the expiration of the year it is no longer possible for the lessee to apply for relief. But during the year the section operates, and if the application is made during the year, the jurisdiction of the Court to deal with the application does not cease, because the application is not dealt with before the year expires.

That seems to be consistent with the language of the section and to give it a reasonable meaning, and that, I think, and I suggest to your Lordships, is the true meaning of the section. A number of other points have been raised before your Lordships' House, but they were either points which had not been taken in the appellant's case or points for which no solid foundation could be shown. I invite your Lordships to dismiss the appeal with costs.

LORD RUSSELL OF KILLOWEN. My Lords, I concur and have nothing to add.

LORD WRIGHT. My Lords, I also concur.

*Order appealed from affirmed and appeal dismissed with costs.*

*Lords' Journals*, March 8, 1934.

Solicitors for appellant : *Woodham Smith and Borradaile.*

Solicitors for respondents : *Stafford Clark & Co., for Ironside & Co., Leicester.*

G. P. L.

[HOUSE OF LORDS.]

LONDON AND NORTH EASTERN RAILWAY COMPANY . . . . } APPELLANTS;

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1934
Feb. 22.

AND

BRITISH TRAWLERS FEDERATION, LIMITED, AND OTHERS . . . . } RESPONDENTS.

*Shipping—Docks—Fish Market at Lowestoft—Removal of Fish by Motor Vehicle—Right of Dock Owners to impose Conditions—Harbours, Docks, and Piers Clauses Act,* 1847 (10 *&* 11 *Vict. c.* 27), *ss.* 33, 83.

Under and by virtue of various statutes, one of which incorporated the Harbours, Docks, and Piers Clauses Act, 1847, a railway company became the owners of a harbour, docks and quays, a statutory market for fish and a railway in connection therewith.

By s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847: "Upon payment of the rates made payable by this and the special Act . . . . the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods." . . . . By s. 83 of the Act "The undertakers may from time to time make such by-laws as they shall think fit . . . . for regulating the shipping and unshipping . . . . and removing of all goods within the limits of the . . . . premises of the undertakers."

Formerly the Company's railway answered all the requirements of fish merchants and owners of trawlers, but latterly the merchants brought to the market motor vehicles which carried fish to far distant places, formerly served by the railway, to the serious loss of the Company's undertaking; to repair which the Company refused to admit to their dock premises any vehicle for the conveyance of fish without a licence which provided (among other things):—

(1.) that the vehicle should not be used for the transport of fish beyond the boundaries of the Company's fish docks except for fish consigned for transit by railway or for sale and consumption within a radius of 12 miles from the docks;

(2.) that no fish transported by the vehicle should be transferred directly or indirectly to or from any other road vehicle for conveyance to any other place beyond a radius of 12 miles from the fish docks:—

*Held*, that the Company were not entitled to impose those conditions upon the removal of fish from their premises without a valid by-law enabling them in that behalf, supposing such a by-law could be validly made; for that the marketing of fish when landed must be regarded as part of the process of shipping and unshipping within the meaning of s. 33 of the above named Act, and that access to the docks must include access with such a vehicle as the party seeking access deems necessary, subject to the power of the Company under s. 83 to regulate such access by means of a valid and operative by-law.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

*Perth General Station Committee* v. *Ross* [1897] A. C. 479 distinguished.

Order of the Court of Appeal [1933] 2 K. B. 14 affirmed with a variation.

Appeal from an order of the Court of Appeal (1) allowing an appeal by the British Trawlers Federation, Ld., and others, the plaintiffs in the action, from a judgment and order of Branson J. and dismissing a cross-appeal by the London and North Eastern Railway Company, the defendants in the action, hereinafter called "the Railway Company." The order of the Court of Appeal also rescinded certain declarations made by the learned judge in favour of the Railway Company and made certain other declarations in favour of all the plaintiffs.

The facts are stated in detail in the speech of Lord Tomlin.

The Railway Company were and are the owners of the Lowestoft Harbour and Docks undertaking together with a railway station and railway lines some of which run along the quays of an Inner and an Outer Harbour. In the Outer Harbour are situate docks called the Trawl Basin, Waveney Dock and Hamilton Dock, and quays called the Trawl Fish Market, the New Quay, the Herring and Mackerel Market, Waveney Market North, Hamilton Market South and Hamilton Market North. There is no franchise of market, but the Railway Company own and carry on their undertaking at Lowestoft in connection with their railway under and by virtue of various statutes including the Great Eastern Railway (Capital, &c., Act), 1865 (28 & 29 Vict. c. clxxxiv.), the Great Eastern Railway (General Powers) Act, 1893 (56 & 57 Vict. c. lii.), and the Great Eastern Railway Act, 1902 (2 Edw. 7, c. xxii.). The Great Eastern Railway (Capital, &c., Act, 1865) incorporated the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which provides as follows:—

Sect. 33: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

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(1) [1933] 2 K. B. 14.

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Sect. 83: "The undertakers may from time to time make such by-laws as they shall think fit for all or any of the following purposes; (that is to say), For regulating the shipping and unshipping, landing, warehousing, stowing, depositing and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers."

Before the general strike in 1926 fish landed at the Railway Company's docks was carried away from their undertaking, (*a*) when the fish was required for sale and consumption in Lowestoft or the neighbouring villages or for export by sea from Lowestoft, in road vehicles, mainly by horse-drawn vehicles or hand carts; (*b*) when it was required for sale or consumption at more distant places, by train on the Company's railway. During the general strike, when the railway was not working, or was only partly working, motor vehicles were for the first time used for conveying the fish by road to more distant places which had theretofore been served by the railway. After the strike the use of motor vehicles for this purpose continued and increased, and the Railway Company began to foresee a serious loss of revenue from their railway undertaking, which in fact occurred.

In these circumstances the Railway Company on June 7, 1930, gave notice to all concerned that they proposed to admit to their premises no vehicle without a licence which provided as follows:—

"(2.) The said vehicle shall not be used for the transport of fish beyond the boundaries of the Railway Company's Fish Docks Estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the Fish Docks, or elsewhere outside such radius as previously approved by the Company.

"(3.) No fish transported by the said vehicle shall be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the Fish Docks." . . . .

It was further provided by the licence that the vehicle should use only the recognized cart roads and landings at the docks and quays; that the person in charge was to abide by all the Railway Company's rules, regulations and instructions; that the licence might be withdrawn by notice at any time given by the Railway Company, and that unless so withdrawn it should remain in force for a year.

The plaintiffs, the British Trawlers Federation, Ld., were a trade protection society of owners of trawling vessels. The plaintiffs, Consolidated Fisheries, Ld., were owners of steam trawlers by which fish are caught and carried to the appellants' harbour and docks. The plaintiffs, Valori Brothers, Arthur Craske, and Clarence Stanley Mortimer, were fish merchants who carried on business at Norwich, Dereham and Ipswich respectively, and who came to the Railway Company's docks to buy fish.

This system of licensing was put in force on July 1, 1930. The plaintiffs objected to it, and in order to test the validity of the licence they on several occasions sent an unlicensed vehicle for the purpose of entering upon the dock estate and removing fish which the plaintiffs had either bought or landed and sold on the quays. In each case the Railway Company refused to allow the vehicle to enter upon the dock estate.

The plaintiffs then brought an action claiming

1. Declarations (*a*) that they and other owners of fish landed or purchased in Lowestoft Harbour or at the Railway Company's Fish Market had a right by themselves or by their servants or agents to remove their fish by the usual means, including motor and other vehicles; (*b*) that the Railway Company were not entitled to impose as a condition of removing fish from the said Harbour or Market by the said means any restriction upon the manner in which the fish was to be dealt with or carried or upon the place to which it might be taken by the plaintiffs or other owners after removal from the Railway Company's premises; (*c*) that the plaintiffs were entitled to take and send on and to the said Harbour and Market motor and other vehicles for the purpose of removing fish landed or purchased by them at the said Harbour or Market;

2. An injunction restraining the Railway Company from interfering with the passage of motor and other vehicles of the

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plaintiffs their servants and agents from the said Harbour and Market over the Railway Company's premises for the purpose of removing the plaintiffs' fish landed or purchased at the said Harbour or Market ;

3. Damages for wrongfully preventing the respective plaintiffs from removing fish belonging to them from the Railway Company's premises and from taking or sending there vehicles for that purpose.

The Railway Company insisted that, as owners in possession of the Lowestoft Harbour and Docks and the markets, roads and approaches thereto, they were entitled to prescribe as they deemed necessary or desirable the type of vehicle which they thought fit to admit to their land, and to exclude such as they thought necessary or desirable to exclude, and to impose such conditions as they thought fit upon all persons desiring to enter upon their premises including the conditions contained in the licence. They claimed an injunction restraining the plaintiffs from bringing or sending any vehicle without having obtained such a licence as aforesaid or without complying with the terms of such a licence.

The case was entered in the Commercial List and heard before Branson J., who gave judgment for the Railway Company, and made declarations :—

(1.) That (subject to an exception not material to this report) the Company were entitled to prevent the entrance of the plaintiffs or of any vehicle employed by or on behalf of them upon the Railway Company's docks for the purpose of buying, selling, cleaning, or sorting fish or preparing it for sale thereon or of conveying fish bought, cleaned, sorted, or prepared for sale and were entitled to attach to any licence given to any of the plaintiffs to enter thereon any requirements or conditions which they might think fit ;

(2.) That the plaintiffs Consolidated Fisheries, Ld., were entitled to remove by the usual commercial methods including motor and other vehicles fish landed at the appellants' docks by the said plaintiffs, but that this right of removal was limited to fish which had not been bought, sold, cleaned or sorted or prepared for sale at the said docks.

The plaintiffs gave notice of appeal against so much of the judgment of Branson J. as declared that the Railway Company were entitled to prevent the entrance of the plaintiffs or their vehicles for the purpose of buying, selling, cleaning, or sorting fish or preparing it for sale on the docks and were entitled to attach to any licence any requirements and conditions including those in question.

The appellants gave a cross notice of appeal against so much of the judgment as consisted of Declaration 2 above in favour of the plaintiffs Consolidated Fisheries, Ld.

The Court of Appeal (Scrutton, Lawrence and Greer L.JJ.) ordered and declared :—

(1.) That the plaintiffs and each of them being owners of trawl fish landed at the Railway Company's docks or harbour or at their fish markets at Lowestoft or purchased in the said docks, harbour or markets were entitled to remove such fish by the usual commercial methods including removal by means of motor and other vehicles or by their agents or contractors on their behalf by such methods ;

(2.) That the Railway Company were not entitled to impose as a condition of the removal of trawl fish from the said docks, harbour or markets by the said methods any restriction upon the manner in which the fish was to be dealt with or carried or the place to which it might be taken by the plaintiffs after removal from the Railway Company's premises or to require them to obtain or accept licences containing the said conditions before sending or taking vehicles to the said markets for the purposes aforesaid ;

(3.) That each of the plaintiffs was or were entitled to take or send on or to the said docks, harbour and markets motor and other vehicles for the purpose of removing trawl fish landed or purchased by them at the said docks, harbour or markets.

The cross-appeal from the declaration in favour of the respondents, Consolidated Fisheries, Ld., was dismissed.

The Railway Company appealed.

1934. Jan. 25. *A. T. Miller K.C.*, *James Wylie* and *Colin H. Pearson* for the appellants. The appellants are owners in fee simple in possession of the harbour, docks, quays, markets, railway station and railway lines at Lowestoft, all of which are vested in them by statute. There are no franchise rights or obligations enjoyed by or imposed upon them. Those portions of their premises upon which the fish markets are held can only be approached by private roads of the appellants. They therefore have the right of owners in fee in possession to exclude other persons from entering upon their tenement: *Perth General Station Committee* v. *Ross*. (1) It follows that they have the right to admit licensees upon such terms and subject to such conditions as they choose to impose without having the reasonableness of the conditions called in question. The plea of liberum tenementum would justify them in removing by force any one who entered their premises without their permission.

The question therefore is whether any Act of Parliament has restricted the rights of the appellants over their estate. The first Act which need be referred to is the Great Eastern Railway (Capital, &c.) Act, 1865 (28 & 29 Vict. c. clxxxiv.). Sect. 1 of that Act incorporates the Harbours, Docks, and Piers Clauses Act, 1847. Sect. 14 enabled the Great Eastern Railway Company, the then owners of the estate, to make by-laws for regulating the times of entry and departure into and from Lowestoft Harbour of all vessels and boats bringing fish for sale within the harbour and for regulating the fish markets and the places and times for vessels landing their fish, and the sale of fish "on that part of the Company's station known as the Fish Market or on any other part of the Company's property." By s. 16 in lieu of any tolls, rates or dues which the Company were then entitled to charge with respect to the pier, fish market, or harbour at Lowestoft the Company was empowered to take the sums specified by way of toll, rate or due.

The material sections of the Harbours, Docks, and Piers Clauses Act, 1847, are ss. 33 and 83. The former section provides that, subject to the provisions of the Act and of the special Act of the undertakers "the harbour, dock and pier shall be open to

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(1) [1897] A. C. 479.

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all persons for the shipping and unshipping of goods and the embarking and landing of passengers." This section does not entitle persons to come upon the premises of the appellants for the purpose of removing goods. Sect. 83 provides that the undertakers may make such by-laws as they shall think fit for regulating the shipping and unshipping, landing, warehousing, stowing, depositing and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers. That section, it is submitted, recognizes the appellants' right at common law as owners of the premises to impose conditions upon the removal of goods from the harbour, for by conferring a right to make by-laws regulating an estate the Legislature does not deprive the owners of land of their rights at common law which are not expressly made the subject of a by-law; see per Lord Watson in *Perth General Station Committee* v. *Ross* (1); notwithstanding certain dicta of Lindley L.J. in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*. (2) The by-law is merely a convenient means of giving public notice of regulations. The licence is another means of effecting the same object. A railway company has power by by-law to impose a penalty on persons travelling without a ticket with intent to defraud the company; but that does not preclude the company from exacting the full fare from a passenger who insists on travelling from London to Carlisle in a first-class carriage without a ticket.

It is not disputed that before the general strike all reasonable facilities and satisfactory services were afforded to the respondents and traders generally by the appellants by means of their railway. It is unfair and unjust that they should be obliged to stand by and see their harbour and dock undertaking become a serious annual expense instead of a profit. The Legislature can hardly have intended to authorize the undertaking without conferring on the appellants the necessary and reasonable powers of maintaining it.

[The following cases were also cited: *Anglo-Algerian*

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(1) [1897] A. C. 479, 486, 487.

(2) [1892] 3 Ch. 242, 250, 251.

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*Steamship Co.* v. *Houlder Line, Ld.* (1); *Great Central Ry. Co.* v. *North Eastern Steam Fishing Co.* (2); *Mersey Docks and Harbour Board* v. *West Derby Assessment Committee, etc.* (3); *Wilsons and Clyde Coal Co.* v. *North British Ry. Co.* (4); *Darlaston Local Board* v. *London and North Western Ry. Co.* (5); *Aiton* v. *Stephen.* (6)]

*Schiller K.C.*, *Sir Robert Aske K.C.*, and *H. M. Abrahams* on behalf of the respondents, assenting to a variation of the order appealed from, were not further called upon.

The House took time for consideration.

Feb. 22. Lord Tomlin. My Lords, the appellants are the owners of a railway and harbour and docks at Lowestoft in the county of Suffolk.

The respondents are bodies and persons connected with or interested in the trawl fishing trade at Lowestoft.

The action out of which this appeal arises was begun by the respondents against the appellants claiming certain declarations to the effect that the appellants were not entitled to impose, as a condition of admitting the respondents' vehicles to the harbour and docks of the appellants for the purpose of removing their fish landed at or purchased in the fish markets carried on within the appellants' premises, any restriction as to the manner in which or the place to which, after removal from the appellants' premises, the fish was to be utilized or removed, and claiming also an injunction and damages.

The case was tried by Branson J., who made certain declarations with which neither side was satisfied, and ordered payment by the appellants to each of the respondents, Valori Brothers and Arthur Craske, of the sum of 2*l.* by way of damages, and directed that all parties should pay their own costs. The respondents gave notice of appeal and the appellants gave notice of cross-appeal. Upon the hearing of the appeal and

(1) [1908] 1 K. B. 659.
(2) (1906) 22 Times L. R. 520.
(3) [1932] 1 K. B. 40.
(4) 1923 S. C. 68.
(5) [1894] 2 Q. B. 694.
(6) (1876) 1 App. Cas. 456.

cross-appeal the Court of Appeal (Scrutton, Lawrence, and Greer L.JJ.) varied the judgment of Branson J. in regard to the form of the declarations, making such declarations more favourable to the respondents, and directed that the judgment as to damages and costs should stand and that the appellants should pay the costs of the appeal and the cross-appeal. Against the order of the Court of Appeal the appellants appeal to your Lordships' House.

The appellants are the owners of a considerable area of land at Lowestoft, comprising their railway, harbour and docks estate in that borough. This estate has been acquired and the railway, harbour and docks and other works thereon have been constructed under the powers of a series of Acts of Parliament extending over more than a century and obtained by the appellants or their predecessors in title or some of them.

There has been carried on by the appellants and their predecessors on the dock quays, since at any rate before 1852, a market or markets for the sale of fish landed at the port. The position of the markets is such that they can only be reached by the private roads and approaches which form part of the appellants' estate. The question is how far the appellants in exercise of their statutory powers or of their powers as proprietors are entitled to impose restrictions upon the access to the fish market by those desiring to buy fish thereat or remove fish therefrom. As will hereafter appear, the appellants are seeking to exclude all vehicles the owners of which will not take from the appellants a form of licence, some of the conditions of which are directed to securing the removal by rail, and not by road, of all fish consigned to places beyond a radius of 12 miles from Lowestoft.

The history of the appellants' undertaking began with the Norwich and Lowestoft Navigation Act, 1827, under which the Company of Proprietors of the Norwich and Lowestoft Navigation were authorized to construct certain works for the purpose of establishing a waterway between Norwich and Lowestoft and a port or harbour at Lowestoft, and certain powers to levy rates and duties were conferred on the company.

Under the Lowestoft Railway and Harbour Act, 1845, a new company called the Lowestoft Railway and Harbour Company succeeded to the position of the original company with increased powers, including a power to build a railway from Reedham to Lowestoft. This second company was in turn superseded by the Norfolk Railway Company under the Norfolk Railway Act, 1846.

The rules and regulations made for the harbour in force before 1852 contained a clause to the following effect: "A convenient fish-wharf and market being provided on the north side of the harbour, convenient also for the railway station, no fish will be allowed to land elsewhere."

New Rules and Regulations for the Harbour were brought into force in 1852, and these contained a provision that all fish were to be landed at the Fish Market on the North side of the Harbour and that no fish would be allowed to be landed elsewhere without special permission.

In 1859 there came into force new rules and regulations entitled "Rules and Regulations of Lowestoft Harbour and Fish Markets." The rules as to the Fish Markets were as follows :—

1. "No fish shall be landed at any place within the harbour excepting at the Fish Markets."

2. "A true statement of the quantity and description of all fish delivered shall be given by the master of each fishing craft or his agent to the clerk of the market, at his office, and the landing dues thereon shall be paid forthwith unless the salesman agree in writing, signed by him, to be responsible for payment of them."

3. "Masters of fishing craft shall clear their nets before coming alongside the markets, and shall remove their crafts immediately after the fish have been delivered."

4. "Fish must be removed from the markets on the day of landing if practicable, and if not, before 8 o'clock on the following morning."

5. "No fish, offal, or offensive matter shall be left in the market or in the roads or approaches thereto, nor be deposited beneath the flooring."

6. "No nuisance of any kind must be committed in the Fish Markets or the approaches thereto."

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7. "No ballast, earth, dust, ashes, stones, or other things shall be thrown or put into or upon the harbour, fish markets, or any of the works."

8. "All orders for the regulation of the markets and the business thereof, given by the harbour master or his deputies, the clerk of the market, constable, or other officials, must be strictly and promptly obeyed."

It is obvious, therefore, that at this date the appellants' predecessors were permitting to be conducted and were controlling fish markets upon the estate which formed their statutory undertaking.

The next step was the formation by the Great Eastern Railway Act, 1862, of the Great Eastern Railway Company through the amalgamation of the Norfolk Railway Company and a number of other railway companies and the transfer to the Great Eastern Railway Company of the statutory undertakings of the amalgamated companies including the statutory undertaking with which this appeal is concerned.

By the Great Eastern Railway (Capital, &c.) Act, 1865, additional powers were conferred on the Great Eastern Railway Company.

The preamble to the Act contained (inter alia) the following recitals :—

"Whereas it is expedient that the Company should have further Powers with reference to Lowestoft Harbour, and the Company's Station and Property in connexion therewith, and for the better Regulation thereof, and of Vessels and the Fish Market thereat ; and that the Company should be empowered to take certain Tolls, Duties, and Charges, . . . . And whereas the Objects aforesaid cannot be effected without the authority of Parliament : " Sects. 12, 14, 16 and 17 of the Act so far as they are material enacted as follows :—

"12. The Provisions of 'The Harbours, Docks, and Piers Clauses Act, 1847,' incorporated with this Act, shall apply to the Lowestoft Harbour, and to the Company in respect thereof, as if such Harbour were under this Act authorized to be constructed by the Company, and the Lowestoft Harbour shall for the Purposes of this Act be deemed to include the

Station, Wharves, and Property of the Company facing the Harbour or the River Waveney flowing into the same."

"14. In addition to the purposes specified in the Eighty-third Section of 'The Harbours, Docks, and Piers Clauses Act, 1847,' for which the Company may make by-laws, the Company may make by-laws for the following purposes :—

"For regulating the times of entry and departure into and from the Harbour of all vessels and boats, whether decked or not decked, bringing fish for sale within the Harbour, and the mooring, stationing, or placing thereof :

"For regulating the fish markets and the places and times for vessels landing their fish, and the sale of fish on that part of the Company's station known as the Fish Market or on any other part of the Company's property."

"16. In lieu of all or any tolls, rates, or dues which the Company now take or are entitled to charge with respect to the pier, fish market, or Harbour at Lowestoft, the Company may lawfully demand and take the following sums by way of toll, rate or due (that is to say) . . . . For fish landed at the Fish Market or on any part of the Company's premises as follows, that is to say" (as therein specified).

"17. And in order to enable the Company to ascertain the quantity of fish landed from any vessel or sold by any salesman at the market or any part of the Company's premises, and chargeable with duty under this Act, it shall be lawful for the harbour-master, deputy harbour-master, or clerk of the market, at any reasonable time in the day, to examine the sale books of the salesman or salesmen respectively by whom such fish shall have been sold ; and any salesman who shall withhold his sale books when lawfully required to produce the same, or shall obstruct the said officer from properly examining the same for the purposes aforesaid, shall for every such offence forfeit and pay by way of penalty a sum not exceeding two pounds."

I think it is a necessary implication from the provisions of the Act to which I have just referred that the fish market carried on upon the premises of the Great Eastern Railway Company was part of their statutory undertaking and that they had power to expend their funds in the maintenance of it.

However this may be, the matter is I think placed beyond doubt by the next Act which it is material to mention—namely, the Great Eastern Railway (General Powers) Act, 1893.

This Act recited that it was expedient that the Company should be authorized to complete and maintain an extension of the trawl basin and fish market in the Company's harbour at Lowestoft. It then incorporated the Harbours, Docks, and Piers Clauses Act, 1847, with the exception of certain sections not material to be mentioned, and enacted (s. 5) that subject to the provisions of the Act the Company from time to time might make, execute and maintain certain works, including the following :—

5. " (H) The completion and maintenance of an extension in the Parish of Lowestoft in the County of Suffolk of the trawl basin and fish market in the Company's harbour at Lowestoft for the distance of about 6½ chains westward of such trawl basin."

The Act then provided that the construction of the works already executed by the Company in or towards such extension and the purchase of lands and property by the Company for the same and the expenditure of money by the Company in respect thereof were thereby sanctioned and confirmed.

Sect. 6 of the Act was as follows : " 6. The Company may subject to the provisions of this Act from time to time make and maintain all necessary and convenient stations approaches quays wharves landing-places warehouses market houses custom houses mooring buoys lifts machinery and other works and conveniences connected with the works hereinbefore described or any of them."

Sect. 19 of the same Act contained a provision in the following terms :—

" 19. The extension of the trawl basin and fish market in the Company's harbour at Lowestoft by this Act authorized and sanctioned shall as regards tolls rates and duties the powers and duties of the harbour master and as regards by-laws and in all other respects form part of the existing trawl basin and fish market aforesaid and the Acts relating to the said existing trawl basin and fish market so far as they are now in force shall be applicable to and within the said extension as if they had been specifically re-enacted and made applicable thereto by this Act."

In the face of this Act it is in my opinion impossible to say that the fish market is not part of the statutory undertaking.

The Great Eastern (Lowestoft Harbour) Act, 1897 (60 & 61 Vict. c. xxxiii.), authorized the Great Eastern Railway Company to construct certain further works. It provided (s. 7) as follows :—

" 7. The works by this Act authorized and the area between the same and the existing harbour of the Company at Lowestoft shall for the purposes of tolls rates and charges by-laws rules and regulations the powers and duties of the harbour master and in all other respects form part of the existing harbour and of the existing south pier (Lowestoft Pier) hereinbefore mentioned and of the Company's fish market at Lowestoft and the Acts relating to the said existing harbour pier and fish market so far as they are now in force shall be applicable to and within the works by this Act authorized as if they had been specifically re-enacted and made applicable thereto by this Act."

By s. 10 of the Act, 1897, the Great Eastern Railway Company were authorized to use and maintain the existing sea wall as part of their fish market or for other purposes in connection therewith.

By the Great Eastern Railway Act, 1902, the Great Eastern Railway Company were authorized to carry out :—

" (B) An enlargement and extension in the Parish of Lowestoft in the borough of Lowestoft in the County of Suffolk for a distance of about 10 chains northward or north-eastward of the basin in the Company's harbour at Lowestoft known as the Herring Basin and of the Company's herring and mackerel market on the western side of the existing basin ;" and it was enacted that upon completion of such enlargement and extension all public or other rights of way or other rights over all or any of the lands taken or used for the purposes thereof under the powers of the Act should be by the Act extinguished.

By s. 17 of the same Act it was enacted as follows :—

"17. The enlargement and extension of the Herring Basin and of the herring and mackerel market in the Company's harbour at Lowestoft by this Act authorized shall as regards tolls rates and duties the powers and duties of the harbour master and as regards by-laws and in all other respects be deemed to form part of the existing basin and market and the Acts relating to the existing basin and market so far as they are now in force shall apply thereto accordingly."

At this stage it will, I think, be convenient to state the effect of the several clauses in the Harbours, Docks, and Piers Clauses Act, 1847, which are incorporated in the statutes governing the Lowestoft undertaking and are material to the questions under consideration.

Sect. 2 of the Clauses Act defines the expression "harbour, dock or pier" as meaning "the harbour, dock, or pier, and the works connected therewith, by the special Act authorized to be constructed."

Sect. 33 is as follows :—

"Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

Sect. 68 provides as follows :—

"No goods shall be allowed to remain upon any of the piers or quays, or in the approaches thereto, for a longer time than shall be allowed by the by-laws of the undertakers" . . . .

Sect. 83 provides as follows :—

"The undertakers may from time to time make such by-laws as they shall think fit for all or any of the following purposes; (that is to say) For regulating the . . . . shipping and unshipping, landing, warehousing, stowing, depositing, and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers."

Sect. 89 is as follows :—

"All by-laws made and confirmed according to the provisions of this and the special Act, when so published and put up, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same."

In 1922 the appellants under an amalgamation scheme had vested in them the undertaking of the Great Eastern Railway.

At all material times there have been in force in relation to the Harbour and Fish Markets general by-laws duly made by the appellants under their by-law making power and confirmed by the competent authority, but as the matters complained of do not arise by reason of the by-laws or anything done thereunder but in respect of the action of the appellants taken without recourse to their by-law making power, and as the appellants do not rely upon the by-laws as a defence, it is unnecessary to consider the contents or effect of the by-laws themselves.

On June 7, 1930, the appellants sent out a circular letter to persons who were in the habit of resorting to the Fish Markets intimating that in future no vehicle would be admitted to the appellants' premises unless the owner had first taken from the appellants a licence containing certain restrictions.

The licence contained the following provisions :—

"In consideration of the London & North Eastern Railway Company granting to me/us this licence to admit the vehicle described in the Schedule hereto on to the private roads of the Company in the vicinity of their Fish Docks and Quays at Lowestoft I/We agree to accept and abide by the following conditions :—

"1. The said vehicle shall at all times whilst upon the said roads exhibit in a conspicuous position the distinguishing badge issued by the said Company with this licence.

"2. The said vehicle shall not be used for the transport of fish beyond the boundaries of the Railway Company's Fish Docks Estate at Lowestoft except in the case of fish consigned for transit by railway from Lowestoft or for sale and consumption within a radius of twelve miles of the Fish Docks or elsewhere outside such radius as previously approved by the said Company.

"3. No fish transported by the said vehicle shall be transferred directly or indirectly to or from any other road vehicle for conveyance to any place beyond a radius of twelve miles from the Fish Docks.

"4. The vehicle shall use only the recognized cart roads and landings at the Fish Docks and Quays for receiving or delivering fish or other goods.

"5. The person or persons in charge of the vehicle shall at all times whilst upon the Company's premises obey and abide by all the Rules and Regulations of the Company and the instructions of their duly authorized officials.

"6. The Company may at any time they may deem it necessary to do so withdraw this Licence by notice in writing without assigning the reason for their so doing and in that event I/We undertake to return to the Company upon demand this Licence and the Badge issued to me/us with it.

"7. This Licence is not transferable either from vehicle to vehicle or from owner to owner and in the event of the vehicle for which it is issued being sold or disposed of the Badge must be returned immediately to the Company.

"8. This Licence unless withdrawn in accordance with Condition 6 remains in force for a period of twelve months from the undermentioned date."

It may well be that some reasonable regulation of traffic coming to the Docks and Harbour is necessary, but one at any rate of the appellants' purposes in introducing this licensing system is to compel those whose fish is to be taken to distant places to use the railway instead of road transport. The plaintiffs objected to this attempt to restrict their liberty of access to the fish markets, and hence the present litigation.

Now it is said by the appellants that they are the owners of the railway, harbour and docks estate and as such in their capacity of proprietors are entitled to exclude altogether or admit upon such terms as they may arbitrarily determine any person who seeks access to the estate except so far as such person has any statutory right of access, and in support of this contention they rely upon the decisions of which the case of

*Perth General Station Committee* v. *Ross* (1) is an example. Further they say that the fish market is only held in the docks by their leave and license, that they are not bound to continue it, and that they can regulate as they please the access to it.

As to any statutory right of access they contend that it is limited to access under s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, for the purpose of shipping and unshipping goods in the narrow sense; that it does not extend to attendance at such market as the appellants may permit to be held on the premises, and that anyhow it does not authorize access with vehicles.

I think that the appellants have misapprehended their position. The case against them may, in my opinion, be stated in two ways:—

First, I think that upon the true construction of the Acts governing the statutory undertaking, and in particular the Acts of 1865 and 1893, the carrying on and control of the fish markets is either expressly or by necessary implication authorized as part of or incident to the harbour and docks undertaking. Except upon this basis it is difficult to see how the appellants can justify the expenditure of their funds upon the upkeep of the markets and the payment of the market officers. In fact they have been authorized by statute to acquire lands for the extension of the markets and to exercise powers in relation to them beyond those which they could exercise as mere proprietors. The result in my opinion must be that as long as they do carry on the markets (and it is not necessary to determine whether they are bound to carry them on) there is necessarily implied a right of access on the part of those who bona fide desire to resort to the markets, subject only to such regulation as may be imposed by valid by-laws duly confirmed by the competent authority.

Secondly, it may fairly be said that, having regard to the terms of the definition of Harbour, Dock and Piers in the Clauses Act and s. 12 of the Special Act of 1865, and to the fact that under the Special Acts the fish markets are part of the works authorized to be carried on by the appellants, the

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(1) [1897] A. C. 479.

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marketing of the fish when landed must be regarded for the purposes of the Special Acts as part of the unshipping process, access for which is given by s. 33 of the Clauses Act. I do not think that the words "shipping" and "unshipping" are to be confined to the narrow operation of lifting goods from the quay to the ship or from the ship to the quay, nor do I think that the access under the section can be limited to access in person without any vehicle. It must I think be such access with such vehicle as the party seeking it bona fide deems necessary, but it is an access always subject to be controlled by valid and operative by-laws.

On either of these views of the case the appellants obtain no assistance from such cases as *Perth General Station Committee* v. *Ross* (1) already referred to.

I think, therefore, the appeal fails.

With all respect to the Court of Appeal I am unable to appreciate why they thought it proper to limit the declarations to the market for trawl fish. It is true that the respondents are persons interested in that market, but they come before the Court as members of the public suffering special damage by alleged wrongful interference with their statutory right of access to the markets. The question whether they can be restricted by the licence system in question is a matter for determination upon a consideration of the rights and duties of the appellants and the public respectively in respect of a property belonging to the appellants, but forming part of a statutory undertaking, and must depend upon the construction of the relevant statutes and the common law rights of a proprietor. No question of reasonableness arises upon which alone it seems to me evidence as to the course of business in the different fish markets in the docks would be relevant.

Further, the form of declarations granted does not seem to me to be satisfactory, and I would invite your Lordships while dismissing this appeal to substitute for the declarations made by the Court of Appeal the following declarations (that is to say) :—

(1.) That subject to any valid by-law made by the defendants and duly confirmed by competent authority, each of the plaintiffs is entitled to take or send on to the defendants' harbour, docks and fish markets at Lowestoft motor and other vehicles for the purpose of removing fish landed or purchased by him or them at such harbour, docks or fish markets.

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(1) [1897] A. C. 479.

(2.) That the defendants are not entitled to impose upon any of the plaintiffs as a condition of the removal of fish from the said harbour, docks or fish markets any restriction upon the manner in which after removal from the defendants' premises the fish is to be dealt with or carried or upon the place to which after such removal the fish is to be taken, or to require any of the plaintiffs to obtain or accept licences containing any such restriction before sending or taking vehicles to the said harbour, docks and fish markets for the purposes aforesaid.

The costs of the appeal should, in my opinion, be paid by the appellants.

I accordingly move your Lordships in the sense which I have indicated.

Lord Warrington of Clyffe. My Lords, I concur.

Lord Russell of Killowen. My Lords, I have had the opportunity of reading the opinions of my noble and learned friends Lord Tomlin and Lord Macmillan. They express my views so exactly that I do not trouble your Lordships with any separate contribution of my own. I agree with the motion to be proposed from the Woolsack.

Lord Macmillan. My Lords, the present appeal raises an important question affecting the rights of the public in relation to the harbour of Lowestoft, which is a statutory undertaking vested in the appellant railway company. The legislative history of the undertaking, which has been traced in detail by my noble and learned friend on the Woolsack, records a progressive extension of the harbour works and of the facilities there provided for the trade of the port. In approaching the consideration of the particular matter now at issue it is well to bear in mind that the powers and privileges conferred upon the appellants and their predecessors by a long series of private Acts have been obtained by them from Parliament on the representation of the public utility of the harbour and find their counterpart in the duties imposed upon them in the public interest. The appellants are no doubt the proprietors of the lands which have been acquired for the purposes of the harbour undertaking and of the works which it comprises, but their rights as proprietors are subject to important statutory qualifications.

The most general obligation towards the public which Parliament has laid upon the appellants is that contained in s. 33 of the Harbours, Docks, and Piers Clauses Act, 1847, which has been made applicable to the undertaking. By this section it is provided that, upon payment of the rates exigible, the harbour, dock and pier shall be open to all persons (inter alia) for the shipping and unshipping of goods. There has been little occasion in the past to construe these wide words, for hitherto harbour undertakers have been more disposed to welcome than to restrict the access of persons desirous of doing business at their harbours. But the advent of the commercial motor vehicle with its extended range and its large carrying capacity has been responsible for the raising of the present, as of so many other problems. The question which has now to be determined is whether and to what extent the appellants are entitled to restrict the admission to the harbour of motor vehicles which members of the public engaged in the fish trade claim the right to use for removing fish purchased at the fish markets on the harbour premises.

The harbour of Lowestoft is pre-eminently a fishing harbour, to which trawlers and drifters resort in large numbers to land their catches. The immediate disposal and dispatch of the fish so landed is a practical necessity of the industry, and in order to facilitate these processes the appellants and their predecessors have established and maintain various fish markets on the quays. The Legislature has recognized that the provision and carrying on of such markets is reasonably incidental to the conduct of the harbour enterprise, as is evidenced by the quotations which my noble and learned friend Lord Tomlin has made from the harbour statutes. To these markets members of the public engaged in the fish trade have long been in the habit of resorting, and from these markets the fish have either been consigned by rail or removed in vehicles by the purchasers.

The appellants now seek to place restrictions on the use of motor vehicles for the removal of fish bought at the markets. They allege that the unrestricted resort of motor vehicles to the fish markets (*a*) will lead to congestion and inconvenience and (*b*) will increasingly divert from their railway the fish traffic which makes it worth their while to carry on the harbour. The appellants undoubtedly have statutory power to frame and enforce by-laws for the regulation of operations at the harbour, but such by-laws require confirmation and must satisfy an exacting standard of legality. For their present purpose the appellants have not had recourse to their delegated power of legislation but have sought to institute at their own hand a system of licensing whereby licences to bring motor vehicles to their fish docks and quays are to be granted only to those who undertake not to use these vehicles for the conveyance of fish more than twelve miles from Lowestoft. This expedient, by excluding long-range motor vehicles, might have the result of diminishing any possible congestion; it would certainly have the result of compelling all long-distance fish traffic from the harbour to go by rail.

My Lords, it would not be proper to indicate any opinion as to whether the appellants could legitimately enact by by-law such a system of licensing. They have not attempted to do so. The legality of the restriction which they have sought to impose must therefore be justified, if it can be justified at all, by the invocation of their inherent rights as proprietors of the harbour estate; and this indeed was their main contention at your Lordships' bar.

Now I have already pointed out that the appellants' proprietary rights are qualified by their statutory obligations. The harbour is to be open to all for the purpose of unshipping goods. It is manifest that this must include the consequential purpose of removing the goods unshipped, and such removal necessitates the employment of the appropriate vehicles.

But assuming that, subject to regulation by by-law, there exists such a right of access with such incidents, the appellants argue that the fact that the fish are sold at the harbour markets before removal makes all the difference. They say that they are under no obligation to provide fish markets or permit sales on their premises, and that if they choose to do so they are entitled to attach such conditions as they please to the enjoyment by the public of these facilities, and in particular the conditions which they have in fact imposed by their system of licensing.

The answer is that the right of access conferred by s. 33 of the Harbours, Docks and Piers Clauses Act includes, by virtue of the definition in s. 2, access to the authorized works connected with the harbour, and the fish markets are among the harbour works which Parliament has authorized. Indeed, if the fish markets were not either incidental to the harbour undertaking or specially authorized, it would have been ultra vires of the appellants and their predecessors to have expended their funds in providing them. Accordingly, so long as the appellants carry on these fish markets as part of their harbour undertaking they have no more power to restrict the access of appropriate vehicles to these markets for the removal of fish purchased there than they have to restrict the access of appropriate vehicles to the ship's side for the removal of goods unloaded; always subject, of course, but subject only, to the rights of regulation by by-law which they possess.

Such cases as *Perth General Station Committee* v. *Ross* (1) afford the appellants no assistance in their contention. The person whose access to the station the Committee were there held entitled to restrict or prohibit made "no claim as one of the members of the travelling public, or as a person interested in goods conveyed by rail to or from the appellants' station": per Lord Watson. (2), Not being on railway business, he had no right to enter the station, and if the Committee chose to admit him they could attach any conditions they pleased to their permission.

I concur in the declarations proposed to be pronounced and I agree that the appeal should be dismissed with costs.

(1) [1897] A. C. 479.

(2) Ibid. 488.

Lord Wright. My Lords, I have had the advantage of reading the opinions which have just been delivered. I am in full accord with them and do not desire to add anything further.

*Order of the Court of Appeal varied by substituting for the declarations therein contained the following declarations :*

(1.) *That subject to any valid by-law made by the defendants and duly confirmed by competent authority, each of the plaintiffs is entitled to take or send on to the defendants' harbour, docks and fish markets at Lowestoft motor and other vehicles for the purpose of removing fish landed or purchased by him or them at such harbour, docks or fish markets ;*

(2.) *That the defendants are not entitled to impose upon any of the plaintiffs as a condition of the removal of fish from the said harbour, docks or fish markets any restriction upon the manner in which after removal from the defendants' premises the fish is to be dealt with or carried or upon the place to which after such removal the fish is to be taken, or to require any of the plaintiffs to obtain or accept licenses containing any such restriction before sending or taking vehicles to the said harbour, docks and fish markets for the purposes aforesaid ; and that subject to such variation the said order of the Court of Appeal of March* 1, 1933, *be affirmed and the appeal be dismissed : And further ordered that the appellants pay to the respondents their costs of the appeal.*

*Lords' Journals*, Feb. 22, 1934.

Solicitor for appellants : *I. B. Pritchard.*

Solicitors for respondents : *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

[HOUSE OF LORDS.]

H. L. (E.)* BARSTOW . . . . . . . . . . . . . APPELLANT;

1934

AND

March 9.

INGHAM'S THORNHILL COLLIERIES, LIMITED . . . . . . . . . . . RESPONDENTS.

*Workmen's Compensation—Injured Workman—Incapacity, total or partial—Probability of obtaining work—"Continuing effects of Injury"—Determination of Employment—Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4—*Workmen's Compensation Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 18), *s.* 1.

Sect. 1, sub-s. 1, of the Workmen's Compensation Act, 1931, provides as follows: "Sub-section (4.) of section nine of the Workmen's Compensation Act, 1925, is hereby repealed, and the following sub-section shall be substituted therefor:—

"(4.) If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the county court judge either—

(i.) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident; or

(ii.) that his failure to obtain employment is a consequence, wholly or mainly, of the injury,

the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act":—

*Held,* that the words "the continuing effects of the injury" have reference to the physical condition of the workman and do not include an act of the employers in dismissing a workman because they may think it unlikely that he will be able to return to work within a reasonable time.

Order of the Court of Appeal affirmed.

APPEAL from an order of the Court of Appeal affirming an award of the judge of the County Court of Yorkshire holden at Dewsbury, made in favour of Ingham's Thornhill Collieries, Ld., upon an application by them for diminution of a weekly sum of 1*l.* 6*s.* 8*d.* paid by them under the Workmen's Compensation Act, 1925, to one Matthew Barstow, the appellant, a miner who was formerly in their employment,

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* *Present:* LORD TOMLIN, LORD RUSSELL OF KILLOWEN, and LORD WRIGHT.

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but whose contract of service had been duly determined shortly before the application.

The workman was in August, 1931, certified in accordance with s. 43 of the Workmen's Compensation Act, 1925, as being disabled by miners' nystagmus contracted in the course of his employment with the Colliery Company. From August, 1931, till February, 1933, the workman was totally incapacitated by the disablement and received compensation at the rate of 1*l.* 6*s.* 8*d.* a week.

On March 20, 1933, the employers applied under s. 11 of the Act of 1925 to review and diminish the weekly payments on the ground that the workman's incapacity was no longer total. On March 31, 1933, the workman filed his answer to the application and relied on s. 9, sub-s. 4, of the Act of 1925, as amended by s. 1 of the Act of 1931, as entitling him to an order that his incapacity should be treated as total on the grounds (1.) that he had taken all reasonable steps to obtain employment and had failed to obtain it; and (2.) that having regard to all the circumstances it was probable that he would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident. On April 6 the employers served on the workman a notice terminating his employment and sending one week's wages in lieu of a week's notice under the contract of employment.

The employers' application was heard on April 11, 1933. The workman contended that the notice terminating his employment was a "continuing effect of the injury" within the meaning of s. 1 of the Act of 1931, but for which it was probable that he would be able to obtain work in the same grade in the same class of employment as before the accident, inasmuch as it was the practice of the employers, when a workman became incapacitated, to keep his place open for him until he recovered his capacity to fill it.

The county court judge found that in the present condition of the coal industry in the district it was very improbable that an unemployed miner applying for work would succeed in obtaining it, and reduced the compensation to 7*s.* 6*d.* a week.

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The Court of Appeal having affirmed the award of the county court judge the workman appealed to this House.

*Upjohn K.C.*, *Edgar Dale*, and *C. H. Spafford* for the appellant.

*Sir Walter Greaves-Lord K.C.* and *W. Shakespeare* were present on behalf of the respondents, but not called on.

LORD TOMLIN. My Lords, this is an appeal by the workman in a Workmen's Compensation case in these circumstances: The appellant was a collier some forty-eight years old, and he had been employed by the respondents since an early age; his average weekly earning were 2*l.* 13*s.* 4*d.* On August 14, 1931, the appellant was certified in accordance with s. 43 of the Act of 1925 to be disabled by the disease of miners' nystagmus contracted in his employment with the respondents. From August 14, 1931, until about February 15, 1933, the appellant was totally incapacitated by reason of this disablement and received compensation at the rate of 1*l.* 6*s.* 8*d.* per week. On February 15, 1933, the respondents gave notice to the appellant of their intention to reduce the compensation from 1*l.* 6*s.* 8*d.* to 7*s.* 6*d.* on the ground that the appellant was no longer totally incapacitated, but had recovered to the extent of being only partially incapacitated. The appellant in opposition contended that notwithstanding his partial recovery he was entitled to receive compensation on the basis of total incapacity. On March 20, 1933, the respondents applied for arbitration under s. 11 of the Act of 1925 to review and diminish the weekly payments of 1*l.* 6*s.* 8*d.* on the ground that the appellant's incapacity was no longer total. An answer was filed by the appellant on March 31 denying the respondents' right to an award diminishing the weekly payments and relying on s. 9, sub-s. 4, of the Act of 1925, as amended by s. 1 of the Act of 1931, for an order that his partial incapacity should be treated as total incapacity on the ground, first, that he had taken all reasonable steps to obtain employment and failed, and secondly that, having regard to all the circumstances, it was probable that the appellant would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident. On April 6, 1933, the respondents served upon the appellant a notice purporting to terminate his employment with them forthwith, that employment admittedly having continued unbroken up to that date, and sent 2*l*. 13*s*. 4*d*., being one week's wages in lieu of a week's notice under his contract of employment. Then the matter came before Judge Drysdale Woodcock on April 11, 1933, and the learned judge found in favour of the respondents and diminished the compensation to 7*s*. 6*d*. per week: that finding has been supported by the Court of Appeal, and it is against that the appellant appeals to this House.

Now the relevant section is s. 9 of the Act of 1925 as amended by the Act of 1931. Sect. 9, sub-s. 1, of the Act of 1925 provides: "The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained." Then there are certain provisoes which need not be referred to. Sub-s. 2 contains the rules for calculating the weekly payments in the case of total incapacity, and sub-s. 3 contains the rules for calculating the weekly payments in the case of partial incapacity. Under sub-s. 4 it is provided: "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the judge of the county court that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the judge shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act"; and there is a proviso which is not material.

The Act of 1931 substituted for that sub-section, which it repealed, a new sub-section. Sect. 1, sub-s. 1, of the Act of

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Lord Tomlin.

1931, enacts that "sub-section (4) of section nine of the Workmen's Compensation Act, 1925, is hereby repealed, and the following sub-section shall be substituted therefor: '(4) If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the county court judge either: (i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident; or (ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury, the judge shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act: Provided that—(i) no order shall be made under this sub-section if it appears to the judge that the workman has not taken all reasonable steps to obtain employment; and (ii) every such order shall be made subject to the condition that it shall cease to be in force if the workman receives unemployment benefit.'" Then sub-s. 2 is: "As from the passing of this Act the provisions of the sub-section so substituted as aforesaid shall apply in any case where the accident happened on or after the first day of January, nineteen hundred and twenty-four, and an application for weekly payments to be reviewed in accordance with those provisions may be made, notwithstanding that there has not been any change in the condition of the workman or any change of circumstances other than the passing of this Act." When the matter came before the learned county court judge he found that the man had been under a contract of employment subject to a week's notice during the whole time in which he had been receiving compensation on the basis of total incapacity up to April 6, 1933, when the notice to which I have already referred was given. He referred to a decision in the Court of Appeal, *Firbeck Main Collieries* v. *Hopewell* (1), where the Court of Appeal had held that the learned county court judge in that case, in finding that it was probable that the workman would but for the continuing effect of the injury be able to obtain work in the same grade in the same class of employment as before the accident, had properly taken into account the fact that there was between him and the employer a contract of employment in existence at the time when the county court judge was considering the matter. Judge Woodcock said this in the present case: "It appears that in order to avoid the results of a recent decision in the Court of Appeal a certain course was taken here." That refers to giving the notice on April 6, and what he means is that when the matter came before the county court judge by reason of that notice having been given there was no contract of employment in existence between the workman and the employer. Then he goes on: "This man, in accordance with the ordinary practice and custom of a coal mine, had not been dismissed. His job was still open to him." That is up to April 6. "The practice of this coal mine, as it is, I suppose, of all of them—certainly all that come before me where the point has arisen—the practice is to keep the place open, and the man can come back and is at once turned on to his own job, and I should say there is no question whatever about it, certainly in this pit, and generally, I should think. In these circumstances this man had never been dismissed." That means up to April 6. "It was open to him at any time to come back, and he would have been entitled to be put on to his own job. These are facts I am finding. But to avoid the results of that decision in the Court of Appeal a notice was given to him on April 6, and his money was tendered to him, and he was then at once dismissed. I have no hesitation in holding that that notice having been given to him, and that money being handed to him, that then and there at that moment the relation of master and servant absolutely ceased." Then the learned judge dealt with the point as to what was the effect of that, and he came to the conclusion, as I read his judgment, that he could not regard the determination of the employment, the giving of the notice on April 6, as something which was within the

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(1) (1932) 25 B. W. C. C. 607.

Lord Tomlin.

words of the Act of 1931, "but for the continuing effects of the injury," and his finding with regard to the probability of employment was as follows: "On the evidence before me, on which I am acting, and certainly on the knowledge I have of this district and of the present condition of the coal industry, which I need not on this occasion refer to because I have ample evidence of it in this Court, I have no hesitation in saying that to-day, as the respondent's own witness, Mr. Oldroyd, told us, he would be very sorry to have to be looking out to-day for a job as a coal getter. Of course he would, because he knows quite well that having regard to all the circumstances—the most important being the absence of demand at this moment for the service of coal getters—he knows quite well that not only is it not probable, but it is highly improbable that a man —a coal getter—would be likely to get a job. And in this case, on the evidence before me, I find that this pit is certainly not taking on new coal getters, and that it is likely in the near future to dismiss a large number. I am satisfied that the evidence of that gentleman was correct, and it is correct because he knows as well as anybody knows who is connected with this area that coal getters are not in demand to-day." Upon that the learned county court judge reduced the compensation and fixed it at 7*s*. 6*d*. a week. That judgment was affirmed by the Court of Appeal.

The question is whether the county court judge was wrong in the view he took of the circumstances that on April 6, the contract of employment between the employers and the workman had been terminated. That depends upon the construction of the first branch of the sub-s. 4 which was substituted by the Act of 1931 as sub-s. 4 of the s. 9 of the Act of 1925. The words, "that, having regard to all the circumstances, it is probable that the [appellant] would, but for the continuing effects of the injury, be able to obtain work in the same grade in the same class of employment as before the accident," seem to me to mean that it is the function of the judge, on the hypothesis that the man is an uninjured man, to consider whether he would be able to work at the time when the county court judge is considering the matter in the same grade in the same class of employment, and if he would if he were an uninjured man, whether there are any continuing effects of the injury which would prevent him from doing so. In other words, would he have obtained employment in the same grade in the same class but for the fact that his recovery was only partial? In my view those words, "but for the continuing effects of the injury," have reference to the physical condition of the workman, and it cannot be said that if, at the time when it is the duty of the county court judge to consider the position with a view to reaching a determination under that branch of the section, there is no contract of employment as between the employer and the workman, he can treat the fact that there had been such a contract which had previously been determined, even though the reason of the determination was because the employers thought that the man's condition was not such that he would ever be able to come back to work, or come back to work within a reasonable time, as constituting at the date when the judge has to consider the matter something in the nature of a continuing effect of the injury. That seems to me to be something which is not within the words at all in the view that I take of that language.

My Lords, in those circumstances I think that this appeal must fail and ought to be dismissed, and I recommend your Lordships to deal with it accordingly.

LORD RUSSELL OF KILLOWEN. My Lords, I am of the same opinion. The object of the first limb of the new sub-s. 4 is to secure to a workman, who has partially recovered, compensation on the footing of total incapacity, if it can be shown that, had he completely recovered, he would probably have obtained work in his old kind of job. The county court judge has to determine whether that has been shown having regard to all the circumstances, that is to say, having regard to the circumstances as they exist at the date when the judge is giving his decision. In this case there was at that date no contract of employment subsisting between the appellant and the respondent. The judge decided the case upon that footing, and treated the appellant as having been put upon the footing of any other person who was applying for work. Upon that footing he held that in view of the state of the coal trade it was not probable that the workman would, but for the continuing effects of the injury, be able to obtain the work prescribed in the section. In my opinion the learned county court judge acted correctly in applying the section to the appellant upon the footing that he had no contract of employment and no special claim in reference to obtaining work. The previous determination of the contract of employment was not a continuing effect of the injury, within the meaning of the section.

My Lords, for these reasons I agree that the appeal should fail.

Lord Wright. My Lords, I also agree.

*Order of the Court of Appeal affirmed, and appeal dismissed with costs.*

*Lords' Journals*, March 9, 1934.

Solicitors for appellant: *Corbin, Greener & Cook, for Raley & Sons, Barnsley.*

Solicitors for respondents: *Barlow, Lyde & Gilbert, for Day & Yewdall, Leeds.*

[PRIVY COUNCIL.]

J. C.*
1933
Nov. 30.

MOUNT ROYAL ASSURANCE COMPANY AND OTHERS . . . . APPELLANTS;

AND

CAMERON LUMBER COMPANY, LIMITED . . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

*Canada (British Columbia)—Insurance (Fire)—Use and Occupation Policy—Lumber business—Valuation of stock-in-trade—Construction of Policy.*

In an action in British Columbia by lumber manufacturers upon policies providing that in the event of a fire upon the insured's premises causing a suspension of business the insurers would be liable to them in respect of the fixed charges and expenses of the business "to the extent only that such fixed charges and expenses would have been earned had no fire occurred" the jury, in valuing the stock-in-trade at the beginning and at the end of the period of suspension, can properly apply the arbitrary figure of $15 per thousand feet, which is recognized widely in the industry and accepted by the income tax authorities, in the absence of evidence that in the particular case the application of that figure would be unjust or unreasonable.

*Quaere*, whether the above cited words of the policies prevent the insured from recovering thereunder unless he proves that but for the fire there would have been earned, not only part of the fixed charges and expenses, but also all other revenue charges necessary for the conduct of the business.

Judgment of the Court of Appeal of British Columbia, 47 B. C. Rep. 52, affirmed.

APPEAL (No. 42 of 1933) from a judgment of the Court of Appeal of British Columbia (January 10, 1933) affirming a judgment of the Supreme Court of that Province (June 17, 1932).

The respondents, who were lumber manufacturers carrying on business in British Columbia, brought seven actions upon identical policies of insurance against fire, described as use and occupation policies. Each of the policies provided, shortly stated, that in the event of the respondents' premises being destroyed or damaged by fire so as to cause a total or partial suspension of business, the insurers would be liable to them in respect of the fixed charges and expenses so far as they would have been earned but for the fire.

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* *Present:* LORD BLANESBURGH, LORD MERRIVALE, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and SIR LANCELOT SANDERSON.

The material terms of the policies appear from the judgment of the Judicial Committee.

The actions were consolidated and tried together by D. A. McDonald J. sitting with a jury. The jury returned a verdict for $24,679·07, and the learned judge, after argument, entered judgment for that sum.

The Court of Appeal, by a majority (Martin, Galliher and McPhillips JJ.A.; Macdonald C.J.B.C. and Macdonald J.A. dissenting), affirmed the judgment. The learned Chief Justice was of opinion that there should be a new trial, and Macdonald J.A. that the action should be dismissed.

1933. July 10, 11, 13, 14. *Alfred Bull K.C.* and *R. Symes* for the appellants.

*E. C. Mayers K.C.* and *A. R. McLeod* for the respondents.

Nov. 30. The judgment of their Lordships was delivered by

Lord Blanesburgh. This is an appeal by the defendants from a judgment of the Court of Appeal of British Columbia affirming, by a majority, a judgment of the Supreme Court of the same Province whereby, following the verdict of a special jury, the sum of $24,679·07 was adjudged to the plaintiffs.

The action in which these judgments were pronounced was one resulting from the consolidation into one action against seven defendant insurance companies of seven suits which had been brought by the plaintiffs against each defendant company separately.

In that consolidated action the plaintiffs sought to recover from the defendants, the present appellants, the aggregate amount alleged to be due under seven policies of use and occupation insurance, each policy, except as to the sum assured, being in terms identical with the others and one policy having been issued to the plaintiffs by each appellant company.

On February 25, 1931, the saw mill, lathe mill, wharf and other buildings of the plaintiffs, who are a company carrying on the business of lumber manufacture in the City of Victoria, British Columbia, were destroyed by fire. The properties so destroyed were insured under ordinary fire policies, and as to these no questions arise or have ever arisen. Liability under them has been duly acknowledged and discharged. The plaintiffs were, however, further insured by the policies of use and occupation insurance already referred to, and in the consolidated action aforesaid their claim under these was to recover the loss which they asserted they had sustained in respect of their fixed charges and expenses during the period of total suspension of business resulting from the fire. The maximum liability of the seven insurance companies collectively under the policies in question amounted to $120 for each day of suspension. As, however, the fixed charges and expenses of the respondents amounted to $124·62 a day, the plaintiffs were in fact uninsured in respect of these to the extent of $4·62 a day. The defendants' maximum liability in respect of each day of suspension was therefore $115·56 per day only. It has, however, been their contention before the Board that no liability whatever under the policies has been established against them or exists, and they claim that the above verdict and judgment in the plaintiffs' favour should be set aside: that in lieu thereof judgment should be entered for them, or, at least, that a new trial of the consolidated action should be directed.

As the case on both sides is based upon the terms of the policies themselves, it will not be inconvenient to refer at once to their relevant provisions. They are all, as has been said, in the same form, and each provides that in the event of the destruction of or damage to the respondents' premises by fire during the term of the policy "so as to necessitate a total or partial suspension of business," the insuring company is to be liable "for the actual loss sustained consisting of:—

"(I) Such fixed charges and expenses as must necessarily continue during a total or partial suspension of business *to* *the extent only that such fixed charges and expenses would have been earned had no fire occurred.*"

The liability during the time of total suspension of business is " to be limited to the 'actual loss sustained,' not exceeding 1/300th of the amount of the policy for each business day of such suspension . . . . *due consideration* . . . . *being given to the experience of the business before the fire and the probable experience thereafter.*"

In the course of the proceedings there has been much discussion on both sides as to the true result of this last italicized passage. Less attention has been directed to the first. To both their Lordships will return later.

There are matters affecting the quantum of loss alleged to have been insured against which were either never in dispute or which are now accepted by both parties. It has, for instance, been agreed throughout that the respondents' annual fixed charges and expenses amounted to $31,157·05, or $124·62 a day. Again, while it was originally claimed by the respondents that the time required for the rebuilding of their mill was 250 days, the jury, in answer to a specific question, limited the period of total suspension of business to 221 days, and that figure is now accepted by both sides. The jury, again, placing upon the policies the construction to which reference will later be made, found in answer to a further question that the respondents during the period of suspension would have earned only a portion of their fixed charges and expenses—namely, $111·67 per day, so that their verdict for $24,679·07 represented $111·67 a day for 221 days. And this figure of $111·67 was reached by them after charging a sum at the rate of $13,120 per annum for depreciation of plant and machinery.

This question of depreciation has been strongly contested. Before the Board, however, allowance of depreciation at the rate fixed by the jury has been accepted by both sides. Their Lordships accordingly need not themselves deal with this question. It is no longer a subject of debate.

The burden of establishing liability under the policies resting upon the respondents as plaintiffs, they, at the trial, put forward in evidence facts and figures which, in their submission, established the claim they made in the action. The defendants, the present appellants, not content with destructive criticism of the plaintiffs' case, put forward and sought to support in evidence alternative facts and figures. These in their final form were embodied in an exhibit numbered 25 and showed affirmatively, as the defendants contended, that there being placed upon the policies the construction already alluded to, the respondents would not during the period of suspension have earned, had there been no fire, their fixed charges and expenses or any part of them.

These rival views of the parties had little in common, but there was one essential difference between them, the proper adjustment of which has become the main, if not the only, existing issue on this appeal. On the question of the proper value to be placed upon the plaintiffs' stock-in-trade—upon their so-called valuations—at the beginning and at the end of the period of suspension, the plaintiffs adopted at both ends an arbitrary figure of $15 per thousand feet, while the defendants placed at each end a differing figure, representing, as they contended, the cost of production of the inventory in each case. And to a question left to them by the judge, the jury replied that in arriving at the figure of $111·67 already mentioned, they had adopted at each end the plaintiffs' figure of $15 per thousand, rejecting the figures of the defendants in that instance.

It will thus be seen that the jury's verdict is based for its principal factor on their finding that the respondents would have earned during the period of suspension only $111·67 per day of their fixed charges. That figure, however, represents no exact translation into money of the whole case made by either side, and in view of the course of the trial as above described it might have been, to say the least, difficult to ascertain from the jury's answers alone the exact extent to which the divergent views presented by one side or the other in evidence had been accepted by them, or the extent to which these had been rejected. More than one explanation of the figure of $111·67 was possible, and had the jury been content to leave their answers without any explanation, the result might well have been that every Court subsequently invited to review their verdict would have been compelled to guess from alternative conjectural sets of figures put forward by one side or the other what was its real basis, a process from which there might have been no definite outcome possible.

The jury, however, foreseeing, it may be, this difficulty, met it in advance by appending to their specific answers an explanatory memorandum, which in the light of the evidence led clearly shows the actual facts which they took into their consideration and accepted. The memorandum was, in fact, the exhibit 25 put in by the appellants as above stated, amended only in the two respects to which attention has already been called : the plaintiffs' figure of $15 per thousand feet being now taken to represent the value of each inventory : the figure at the rate of $13,120 per annum for depreciation being now inserted in place of the higher figure appearing in the exhibit.

In every other particular the jury accepted the appellants' figures. It becomes clear, too, from a consideration of the memorandum that in reaching their conclusion the jury, except with reference to the question of inventory valuation, in no way pronounced upon the alternative figures put forward and relied upon by the plaintiffs. The plaintiffs accordingly cannot uphold the verdict on the ground that their case as a whole, supported as it was by evidence, was the case accepted by the jury. It was by the appellants' memorandum and the appellants' evidence with reference thereto that, with their two amendments only, the jury reached the conclusion embodied in their formal verdict.

The regularity of their procedure in this regard was never seriously questioned. In their Lordships' view, the memorandum has been a valuable aid to each tribunal which has been called upon to consider and adjudicate upon the competence of the jury's verdict. And with reference to the detailed figures, disclosing the reasoning on which the verdict is rested, the result has been that a basis of computation well

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open to question by the respondents has not been canvassed by them, so that in what might have become a litigation of almost infinite complexity there remains only one question in effective issue between the parties—namely, the question on which, as above stated, the jury accepted the evidence and contentions of the respondents in preference to those of the appellants. The only real question which remains for determination is whether the jury were entitled so to do.

Before entering upon its consideration their Lordships desire to refer to a construction, already mentioned, which the jury were invited to place upon the policies, and which has so far, without objection from any quarter, been taken to be correct. It has been assumed that the limitation of the insurer's liability in respect of fixed charges and expenses "to the extent only that such fixed charges and expenses would have been earned had no fire occurred," prevents any liability from attaching under the policy until it has been shown by the assured not only that some part of these charges and expenses would have been earned had there been no fire, but also that all other revenue charges for the proper conduct of the business would have been earned as well. That may be the true effect of the words used, but the question has not been argued, and in view of its possible importance in future cases arising under such policies, their Lordships, while in this case accepting the assumption on which all parties have so far proceeded, desire to intimate that upon its correctness or otherwise they express no opinion of their own. It may in some future case have to be considered whether the words used fairly import a condition which is not in terms expressed, whether they require an assured to apply all moneys earned in discharge, in the first instance, of revenue liabilities other than fixed charges and expenses, and whether within the meaning of the policies, liability on the insurer does not attach without more so soon as it is shown that moneys would have been earned available to meet his fixed charges and expenses had the assured thought fit so to apply them. It is fixed charges and expenses that must have been earned. Not profits. The importance of this point is obvious. If in the present case this alternative construction of the policy had been put forward and upheld, the respondents would, on the appellants' own exhibit 25, unamended, have been entitled to judgment at the full insured rate of $115·56 a day and the question of difficulty contested on this appeal would not have arisen.

Their Lordships now come to the consideration of that question the one remaining issue between the parties. They may phrase it as follows: Was there evidence fit for the consideration of the jury which entitled them, if they thought fit, to place upon the inventories the values put forward by the plaintiffs and to reject those put forward by the defendants? Ought they to have been directed, as a matter of law, that the principle of the defendants' valuations was correct, and that their only duty was to determine whether in the figures put forward by them it had been correctly applied?

In answering these questions it is convenient to ascertain the reason for the adoption by the respondents of the arbitrary figure of $15 per thousand feet. This very clearly appears in the evidence. It is admitted that the valuation of lumber inventories for accounting purposes involves a difficult problem, and for many years in concert with practically every other lumber company in British Columbia, and with the approval of the Income Tax Authorities, the plaintiffs have adopted an arbitrary figure for valuation, so adjusted, however, as not to exceed what may be taken to be the market value of the inventory at the time. It was admitted by the appellants' principal witness that in the presentation of a lumber company's accounts over a period of years this method might be fairly adopted.

There was, however, evidence fit for the consideration of the jury—although on this point there was undoubted conflict—that even over a short period the method was not open to objection. And it was not contested that an actual valuation of the inventory piece by piece or even the ascertainment of its cost of production piece by piece was impracticable and was never in practice attempted. The question, it must be remembered, is not whether their Lordships on this point would adopt the view of the jury if the decision rested with them. The question is whether there was evidence before the jury upon which, not improperly, they could reach the conclusion at which they arrived. It was contended before the Board that the words of the policy requiring due regard to be had to the experience of the business before the fire justified the jury in accepting as permissible the respondents' long-continued practice in this matter. Their Lordships, however, are unable to place upon these words a construction wide enough to justify that contention. All that can perhaps be said in this connection is that a method of valuation so widely recognized in the industry and adopted by the assured in their business may find its justification in the absence of evidence that its application in the particular case would be either unjust or unreasonable.

And here there was a complete absence of any such evidence. On the contrary, there was evidence that the method of valuation put forward by the appellants when properly examined was in its essence at least as arbitrary as the figure of the respondents. Moreover, their method really treated the business assumed to have been carried on during the period of suspension as one which began and ended with that period instead of being a business in unbroken succession to the respondents' business and one to be continued after the period of suspension had come to an end. It is not necessary for their Lordships to go into further detail in this matter. They are quite satisfied that there was ample evidence before the jury to justify them in preferring the respondents' figures of valuation to those of the appellants : there was evidence on which they might conclude that the appellants' method furnished no picture of the true position and, while being no less arbitrary than the respondents', was, in its result, unjust to them.

In these circumstances the view of the jury in this matter must be accepted. That they should have been directed, as matter of law, to give effect to the appellants' principles of valuation is, in the view their Lordships take of the matter,

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hardly susceptible of argument. The whole question was one for the jury, and there is no legitimate ground shown for any interference with their conclusion.

Their Lordships accordingly will humbly advise His Majesty that this appeal be dismissed, and with costs.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondents : *White & Leonard.*

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[PRIVY COUNCIL.]

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*Jan. 24.*

WESTERN POWER COMPANY OF CANADA, LIMITED . . . . . APPELLANTS ;

AND

CORPORATION OF THE DISTRICT OF MATSQUI . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

*Canada (British Columbia)—Supply of electric energy—Contract with Municipality—Construction of Contract—Clause limiting charges—" Similar services."*

By a contract made in 1913 the respondent municipal corporation granted to the appellant company the right and privilege to sell electric energy for lighting, heating, power, industrial and other purposes incidental thereto, within the municipality for a period of forty years. By clause 11 the company agreed not to make any charge for supplying the corporation or any of the inhabitants of the municipality greater than that paid for similar services by any municipality or the inhabitants thereof, and that it would not discriminate against the corporation or residents of the municipality :—

*Held*, (1.) that the prohibition against making higher charges was not limited to charges made by the appellant company itself, but extended to charges made by any supplier in the Province ; (2.) that the words " similar services " did not refer to the character of the areas supplied according as it rendered the service more or less costly, but to the purpose or user of the electric energy supplied according to classifications in schedules of rates.

Judgment of the Court of Appeal of British Columbia, 47 B. C. Rep. 335, affirmed.

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* *Present :* Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright, and Sir Lancelot Sanderson.

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WESTERN POWER CO. OF CANADA
*v.*
DISTRICT OF MATSQUI CORPORATION.

APPEAL (No. 76 of 1933) from a judgment of the Court of Appeal of British Columbia (June 6, 1933) affirming a judgment of the Supreme Court of that Province (January 5, 1933).

The respondent municipal corporation brought an action in the Supreme Court against the appellant company to enforce the terms of a contract, dated March 29, 1913, between the corporation and a company, the predecessors of the appellant company, for the supply of electric energy to the corporation and the inhabitants of the municipality. The question for determination was the charges which the appellant company were entitled to make upon the true construction of clause 11 of the contract.

The terms of the clause and the other material facts appear from the judgment of the Judicial Committee.

The Court of Appeal by a majority (Macdonald C.J.B.C., Martin and Macdonald JJ.A.; McPhillips J.A. dissenting), affirming the judgment of Murphy J. at the trial, construed the clause in the same manner as that now adopted by the Judicial Committee. The judgments in both Courts in British Columbia are reported at 47 B. C. Rep. 335.

1933. Dec. 8, 11. *J. W. de B. Farris K.C.* and *Wilfrid Barton* for the appellant company.

*Pritt K.C.* and *C. W. Measor* for the respondent municipality.

1934. Jan. 24. The judgment of their Lordships was delivered by

LORD WRIGHT. This appeal is from a portion of a judgment given against the appellant, who was defendant in the Court below, in the Supreme Court of British Columbia and affirmed by the Court of Appeal of British Columbia.

The portion of the judgment appealed from is in these terms: "This Court doth declare that the defendant has committed a breach of the contract in the pleadings mentioned, dated March 29, 1913, and made between the plaintiff [now the respondent] and the Western Canada Power Company, Ld., which contract was assigned by the Western Canada Power

Company, Ld., to the defendant on November 1, 1916, in that it has made charges for the supply of electrical energy to the plaintiff and to the inhabitants of the plaintiff municipality greater than that paid by the district municipality of Burnaby, in the Province of British Columbia, and its inhabitants, for the supplying of electrical energy for similar services.

"And this Court doth adjudge that the defendant be and it is hereby restrained and ordered to desist from charging for the supply of electrical energy to the plaintiff and to the inhabitants of the plaintiff municipality rates greater than that paid by any other municipality or the inhabitants thereof other than a city for the supplying of electrical energy for similar services."

The question in the appeal depends on the true construction of clause 11 of the contract dated March 29, 1913, which was made between the respondent, who was plaintiff in the action, and the predecessors in title of the appellant. The term appellant is used herein indifferently to describe either the actual appellant or its predecessors in title, since no distinction need be drawn for purposes of this appeal. The appellant is and was a company making and supplying electric energy for light and power in British Columbia in the vicinity of Vancouver City. In the territory served by it is the respondent municipality. By the contract in question the respondent granted to the appellant the right and privileges to sell electrical energy for lighting, heating, power, industrial and other purposes incidental thereto within the respondent's limits for a period of forty years from the date of the contract ; the appellant was given power within the respondent municipality to erect steel towers, poles and other apparatus along streets and across or under highways " and to do all things which may be necessary in the supplying of electrical energy for lighting, industrial power, heating or other purposes," subject to the approval of the respondent's board of works. No monopoly rights were granted to the appellant.

Clause 11 of the contract on which the present dispute turns was in these terms : " The company covenants and agrees with the corporation that the company will not make any charge for the supplying of electric energy to the corporation or any of the inhabitants of the municipality greater than that paid for similar service by any municipality or the inhabitants thereof other than a city, and will not in any way discriminate against the corporation or residents of the municipality."

The respondent's complaint in the action was that in breach of that stipulation the appellant had charged and was charging to the inhabitants of Matsqui a higher rate for electrical energy than was being charged to the inhabitants of the municipality of Burnaby.

Before dealing with the construction of the clause some facts may be stated. Matsqui and Burnaby are both municipalities under the Municipalities Incorporation Act of British Columbia: in that Act a distinction is made between city municipalities and township or district municipalities, the former class consisting of municipalities of an area not exceeding 2000 acres and of a population of not less than 100 male British subjects, the latter class consisting of municipalities of an area not defined by the Act and of at least 30 male British subjects. Both Matsqui and Burnaby are of the latter calss: neither is a city municipality. But at the date of the trial, about which date alone evidence was given, no evidence being led as to the position at the date of the contract, Burnaby was a suburban district, close to the city of Vancouver, with an area of 24,320 acres and a population of 26,000, whereas Matsqui was of larger area and sparser population—namely, 54,542 acres and a population of 7200. It was about 30 miles from Vancouver City and was rural in character, whereas Burnaby was a somewhat more industrial district.

The appellant's case was that it was more costly to supply electrical energy to a scattered and rural population over a large area, because greater length of cable and greater equipment were required, involving greater original cost and greater expense of upkeep, and because in various other respects the cost of distribution of power and collection of rates was greater in Matsqui than in a compact area like Burnaby. It was calculated that the distribution cost per customer was two and one-half times as much in the former as in the latter district.

Rates schedules of charges were put in at the trial. From these rates schedules it appeared that distinctions were drawn on the basis of the nature of the purpose and the character of the demand of the electric energy supplied ; in particular there were in the schedules "domestic lighting rates," including residence lighting, heating, cooking, according to the floor area of the consumer's house, and "commercial lighting rates," for stores, offices, warehouses, workshops, and so forth, "sign lighting rates," "small power rates," "general power rates," and "wholesale power rates." The schedules applied both to Burnaby and to Matsqui, because they were issued by a combination of companies, which embraced the appellant, engaged in the supply of electrical energy ; but in fact the appellant, notwithstanding that it was party to an agreement made on June 27, 1921, under which it transferred to the British Columbia Electric Railway Co., Ld., in return for a fixed rental the operation and maintenance of its undertaking, retained its identity as a company and as the holder of the franchise under the contract with the respondent, and accordingly for the purposes of this case must be taken to have continued to be the supplier of electrical energy to the respondent municipality and its inhabitants, whereas Burnaby was supplied by the Electric Railway Co. The rates schedules, which covered all the operations of this character of the combined companies, contained rates varying not only with the character and purpose of the power supplied, but also with the character of the various districts ; thus different rates were respectively quoted for supplies for the same category of power to such areas as Vancouver City, Burnaby, and the respondent municipality.

The appellant raised two main contentions of principle, each involving the construction of clause 11. The first was that the prohibition against making higher charges was limited to the charges made by the appellant itself to its various customers, municipalities and inhabitants, and did not bring into comparison charges made by other electric supply companies ; the second was that the words "similar service" referred to the character of the areas supplied, according as it involved more or less costly service, and not to the character of the

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demand, that is, purpose or user, as being, for instance, domestic or industrial of the electric energy supplied. These contentions call for separate discussion.

Clause 11 does not in express terms define its geographical application, nor are there words following the word " paid " defining the payees contemplated. The appellant's contention was that words are to be added by necessary implication after the word " paid " and that the words to be necessarily or reasonably added as being so implied are " to the company "—that is, the appellant ; if not, it is contended, there can be no limitation imposed save one which is world-wide. Their Lordships cannot accept that contention. No doubt words can be supplied to give effect to the obvious or apparent purpose of a contract. But this can only be if the language taken as a whole in connection with the circumstances carries with it the meaning sought to be attached to it. Unexpressed intention is of no legal effect. In their judgment the words " to the company " would be words of specific limitation outside what can be inferred from the general tenor of the contract. If intended these words must have been expressed, but if not expressed they cannot be implied. There is here no question of rectification. The word " paid " no doubt necessarily involves that payment is made to some one, but the person obviously intended is whoever earns the payment by supplying the electric energy. To use a common phrase, these words go without saying ; but to insert the name of some specific payee, such as the appellant, goes beyond what is permissible in construing the contract and adds a new term which cannot truly be said to be involved in the purpose of the contract. It is, however, further objected that the construction of the contract must be reasonable and that if the limitation of clause 11 to the appellant is not inserted, no alternative limitation is possible other than one of world-wide scope. Reasonable interpretation is certainly prima facie to be adopted if the words admit. But here there is, in their Lordships' judgment, a reasonable limitation which need not be expressed because it follows from the very nature of the contract—that is, a limitation to British Columbia. The distinction between city and other municipalities is a distinction drawn from the Act of British Columbia, cited above, even if it is to be found in the legislation of other Provinces ; the parties were in British Columbia and the appellant's undertaking was operating in British Columbia, subject to the relevant sections of the Water Act, 1909, which applied to other such undertakings in the Province. To imply a limitation to neighbouring plants would, in their Lordships' opinion, be illegitimate as involving something specific and not necessarily involved. But the limitation to the Province flows from the nature and purpose of the contract, and must apply without express words and in the absence of clear manifestation of intention to the contrary.

It is objected that so wide a scope of comparison is unreasonable and oppressive to the appellant, since the Province covers an enormous area, and might expose the appellant to ruinous competition, because electric undertakings more favourably situated as regards natural resources and as regards conditions of demand, and perhaps even subsidized, might come into comparison. But no evidence was called to show that at the date of the contract there was any such practical danger or to show what was the position of the Province as regards electric undertakings at that date. The only evidence called had reference to conditions at the date of the trial—that is, at a date about twenty years later in a progressive Province. Even if, however, the contract may have been one which might appear improvident for the appellant to have made, yet the appellant was obtaining a valuable franchise for forty years, even though it was not a monopoly, and may well have been prepared to risk any possible competition.

Their Lordships accordingly construe the contract as meaning that the appellant will not make any charge for the supplying of electric energy greater than that paid to any person (that is, individual or company) in British Columbia for similar service by any municipality or the inhabitants thereof other than a city. The further words of clause 11 relating to discrimination do not affect the question here.

It must now be considered what is meant by "similar service." It is claimed on behalf of the appellant that "similar service" has reference to "similarity," not merely in the electric energy supplied, but in the effort and cost to the appellant in supplying it: thus the same number of kilowatt-hours of light supplied to a resident in Matsqui may—indeed, must—involve greater effort and expense to the supplier than the same number of kilowatt-hours of light supplied to a resident in Burnaby, because of the difference in the general conditions of the two places described above. "Service," it is argued, is a word apt to emphasize the operations of the supplier, not the product supplied, and is a word which fixes attention on the supplier's effort and expenditure, not on the consumer's demand or his utilization, which is something that operates after the energy is supplied. When answer is made that such a construction would render impossible any comparison between services in different municipalities except by means of elaborate investigations of local conditions affecting supply, it is replied that such inquiries are not unknown where legislation provides against undue preferences; thus, it is argued, decisions in English Courts have proceeded on the basis of such comparison of the supplier's expense or effort and have given the word "similar" the meaning for which the appellant contends. In *Metropolitan Electric Supply Co., Ld.* v. *Ginder* (1) questions arose under the Electric Lighting Act, 1882, ss. 19 and 20 of which were directed against undue preference being given to any particular consumer. Sec. 19 provided that every person in the area was entitled to a supply on the same terms on which any other person in the area was "entitled under similar circumstances to a corresponding supply." Buckley J. held that circumstances were not similar when one consumer was on the day load and another on the night load, and that a small consumer was on a different footing from a large consumer: "The cost," said Buckley J., "to the company may be very different." Again, in *Att.-Gen.* v. *Hackney Corporation* (2) it was held that if there were circumstances which rendered it less costly or

(1) [1901] 2 Ch. 799, 811.

(2) [1918] 1 Ch. 372.

otherwise more profitable to supply A. than B., that constituted a legitimate reason for making a lower charge to A. for the same supply. These authorities, however, were concerned with different words from those in the contract between these parties ; the words were " supply under similar circumstances for a corresponding supply." But furthermore these authorities also recognize that a dissimilarity exists in the case of the supply to users of energy for power, who as a class are entitled to be charged at a lower rate than users of supply for light. That indeed is the principle for which the respondent here contends : he argues that " similar service " is not directly concerned with cost to the company supplying or to difference in local conditions of supply, such as exist, for instance, as between urban and rural municipalities, but simply to such difference or similarity in the energy supplied—that is, the " service "—as is illustrated by the words of the contract itself. Thus in clause 11 reference is made to " lighting and power service," which may be compared with the words " electrical energy for lighting, heating, power, industrial and other purposes " in clause 1. Again, in the rates schedules, quoted above, different rates are charged for the different purposes or demands ; phrases are used such as " lighting service," " lighting and electric range service," " alternating-current three-phase service." In the appellant's amended defence, para. 7 (*a*) 3 (*a*), reference is made to " the nature of the service, whether domestic, commercial or industrial." In their Lordships' judgment, the words " similar service," used as they are in clause 11 in connection with charges for supplying electric energy, have reference to such well known categories as have just been illustrated ; such categories determine the rates to be charged. In that way a simple basis is available for comparing charges in one municipality with those in another, and no elaborate examination of local conditions or of comparative costs to the supplying companies is required or permitted. Every Electric Supply Company is required by s. 279 of the Water Act (R. S. B. C. 1911, ch. 239), to publish its schedule of rates, which under s. 278 are subject to the approval of the Lieutenant-Governor in Council of the Province. What, therefore, the appellant was agreeing to in 1913 was that its schedule of rates should not be higher than the schedule of rates of any other such company in British Columbia for "similar service"—that is, on a comparison of the detailed charges of one with the other.

This comparatively simple method of comparison was intended, in their Lordships' judgment, to avoid the risk of the appellant securing an actual, if not contractual, monopoly, and then putting up its prices, which, even if sanctioned under the Act, might still be higher than those charged elsewhere. "Similar service" is service which is not indeed identical, but corresponds in similarity in accordance with classifications adopted in a schedule such as the rates schedule.

It was sought to establish a technical or customary meaning in this contract of the words "similar service." It is enough to say that the attempt completely failed and the evidence was wholly insufficient. These words are words of ordinary user and must be construed in their natural sense in view of the circumstances of the case.

As already explained, the appellant and the company supplying in Burnaby are different concerns, so that any contention based on the theory that they are identical may be put aside.

This conclusion agrees with the reasoning of the trial judge and of the majority of the Court of Appeal. In their Lordships' judgment the appellant committed a breach of the contract in charging a higher rate for lighting than that charged by the British Columbia Electric Railway Co., Ld., for the similar service of lighting in the municipality of Burnaby.

It follows that, notwithstanding the able argument for the appellant of Mr. Farris, which loses nothing of merit because unsuccessful, their Lordships are of opinion that the appeal should be dismissed and the appellant should pay to the respondent its costs of the appeal. They will humbly so advise His Majesty.

Solicitors for appellants: *Gard, Lyell & Co.*

Solicitors for respondents: *White & Leonard.*

[PRIVY COUNCIL.]

J. C.*
1934
Feb. 15.

SIQUEIRA . . . . . . . . . . . . APPELLANT;

AND

NORONHA . . . . . . . . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

*Kenya — Account stated — Account with credits and debits — Consideration — Limitation—Statute barred items—Indian Contract Act (IX. of* 1872), *s.* 25, *sub-s.* 3.

An account stated may take the form only of a mere acknowledgment of a debt; in that case though it amounts to a promise from which the existence of a debt may be inferred that inference may be rebutted, and then there is no consideration and no binding promise. But there is another form in which the account stated includes items on both sides, and the parties have agreed that there shall be a set-off and that only the balance shall be paid; in that case there is a promise for good consideration to pay the balance even though some of the debts were barred by limitation.

The account stated in the present case being in the latter form, it was unnecessary to decide whether the implied promise was "a promise made in writing" so as to be, by s. 25, sub-s. 3, of the Indian Contract Act, 1872 (which applied locally), an effective agreement to pay statute barred debts although it was made without consideration.

Judgment of the Court of Appeal for Eastern Africa affirmed upon a different ground.

APPEAL (No. 48 of 1933) from a decree of the Court of Appeal for Eastern Africa (December 31, 1932) varying a decree of the Supreme Court of Kenya (April 21, 1932).

The respondent sued the appellant in the Supreme Court of Kenya claiming the sum shown due to him by an account stated on March 27, 1928, less a sum subsequently received, together with interest.

The facts appear from the judgment of the Judicial Committee.

By Orders in Council the Indian Contract Act (IX. of 1872) and the Indian Limitation Act (XV. of 1877) applied in Kenya.

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* *Present:* LORD ATKIN, LORD THANKERTON, and SIR SIDNEY ROWLATT.

The provisions of s. 25, sub-s. 3, of the former Act appear from the judgment.

The trial judge (Barth C.J.) made a decree for the amount of salary and bonus due to the plaintiff from March 27, 1925, less sums subsequently paid him. The learned Chief Justice was of opinion that the account stated was only an acknowledgment which, under s. 19 of the Indian Limitation Act, 1877, gave rise to a fresh period of limitation.

An appeal by the plaintiff to the Court of Appeal for Eastern Africa was allowed and the decree varied in his favour. The learned judges (Sullivan C.J.A., Thomas J. and Low J.) were of opinion that the account stated, though a promise without consideration, was by s. 25, sub-s. 3, of the Indian Contract Act, 1872, a valid agreement to pay the statute barred debts.

1934. Feb. 15. *Evershed K.C.* and *Theobald Mathew* for the appellant.

*Singleton K.C.* and *Tooth* for the respondent.

The judgment of their Lordships was delivered by

LORD ATKIN. Their Lordships do not think it necessary to hear counsel for the respondent.

This is an appeal from a judgment of the Court of Appeal for Eastern Africa varying a judgment given in the Supreme Court of Kenya by the then Chief Justice, Sir Jacob Barth. They varied the judgment by increasing the amount due.

The claim of the plaintiff arises in these circumstances. It appears that before and up to 1911 a Mr. Siqueira carried on the business of a general store in Nairobi. In that year he died, leaving as his widow the present appellant, Mrs. Siqueira. Mrs. Siqueira does not seem to have taken an active part in the conduct of the business, and from 1913 it seems to have been conducted up to the year 1922 by her brother, the second defendant, Mr. Rodrigues, under a power of attorney, granted by the lady.

The plaintiff, Noronha, had been carrying on business before 1913 elsewhere, and in 1931 he joined this business and worked under Rodrigues, who happened to be his brother-in-law, Rodrigues being, as stated, the brother of Mrs. Siqueira, and the plaintiff being a cousin of the lady and of Rodrigues as well as his brother-in-law. He was employed continuously in the business from 1913 to the beginning of 1928, except for a short absence in India at one time. During the whole of the time, the plaintiff's salary had never been definitely settled. There seems to have been a sort of understanding that he should get something, not less than what he had been getting before, which was 150 rupees per month, and commission; but the exact extent of the salary never was settled during the whole time that he was there. The business went on in the ordinary way, except that in 1922 Rodrigues became a partner, until, in 1930, the business was wound up.

In January, 1928, the plaintiff left his employment by agreement and went off to India to better himself, and it is plain from the evidence that, before he went, he asked Rodrigues for a statement of his account, and Rodrigues promised to send it, and in due course he sent it.

During the whole of this period the plaintiff had been making drawings of different amounts from the cash of the business, which he had entered in the books which he kept, or which he had caused to be entered in the books, in some cases by a subordinate. The accounts showed drawings for his own purposes, and in some cases he had provided cash for the purposes of Mrs. Siqueira in respect of some passage money which had been paid on her account. At any rate, at the time he left there were in the books of the business statements of certain drawings, and there were no credits in the books for salary at all, because the salary had never been fixed by the employer.

Eventually, in March, 1928, Rodrigues, who was then and for a long time had been, the managing partner, sent the document which is to be found at page 6 of the record. It is headed: "In account with B. C. Siqueira, Nairobi and Mombasa," and is dated March 27, 1928. It begins: "By balance due on December 31, 1921," 26,000 odd shillings. It then states accounts for the ensuing six years, entering debits during each year in one instance of 5162 shillings, and salary and other credits 9968 shillings. Then 1923: "To total debits for the year, 5818 shillings," and "By salary for the year and refund of passage, 4914 shillings." It proceeds in that way to deal with the debits, which vary each year: 1315 shillings; 1350 shillings; 773 shillings; and the last year, 3014 shillings. The last year also contains as a credit item "By salary and bonus for the year, 4700 shillings," which is the amount to credit in each year. It ends "By balance in your favour on 31.12.27, 42,458·84." On that document Mr. Rodrigues put two stamps of 10 cents each, which appear to have no real legal significance, or revenue significance as far as one can see, and over the stamps he signed: "For and on behalf of B. C. Siqueira"—which is the firm's name—"B. A. Rodrigues, Managing Partner."

Upon that document the plaintiff sued, representing it as an account stated, and their Lordships have no doubt that is the substance of the claim.

When the claim was brought forward there was an attack made upon it in the first instance on the ground that the settlement had been collusive between Rodrigues and the plaintiff. The trial judge negatived that. There was no evidence to support it, and the case comes before their Lordships as one in which there were genuine business relations between the parties and a genuine settlement.

The next matter that was sought to be said against the account was that Rodrigues had no authority to settle such an account as this. The learned judges have held in favour of Rodrigues that he had such authority, and it appears to their Lordships quite plain from the nature of the case that Rodrigues was the one person who could have settled it: he was the one person who had the adequate knowledge, and it was quite within the ordinary and regular course of the business that he should settle an outstanding account of this kind with one of the servants of the business. Their Lordships therefore find it unnecessary to say anything further on the question of authority.

Now, when the Courts came to deal with this matter they appear, as it seems to their Lordships, somewhat unfortunately, to have been asked to deal with the matter upon the footing that this, which was alleged to be an account stated, amounted to an implied promise to pay without consideration, and, having got that in mind, they then began to consider questions that arise under the Indian Contract Act, 1872, and the Indian Limitation Act, 1877, which are applied to Kenya by appropriate Orders in Council, which it is unnecessary to deal with here.

The account itself goes back to the whole of the period from 1913, and it obviously relates to items and transactions which happened long before the period of three years, which is the appropriate period of limitation for simple contracts, or contracts for service under the Indian Limitation Act.

There was an argument put before the learned judges that this was an acknowledgment under the Limitation Act. The acknowledgment has to be made during the period of limitation, and the question might have arisen as to whether or not this was or was not an acknowledgment within the meaning of the Act.

Then the matter was thought to be disposed of by the terms of s. 25 of the Indian Contract Act. That section deals only with the question of promises made without consideration. The relevant part of that Act provides that an agreement when made without consideration, is void unless it is expressed in writing; but it says by sub-s. 3: "unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits." An interesting argument was addressed to the Courts there, and would probably have been addressed to their Lordships by Mr. Evershed, if it had not turned out to be unnecessary, to the effect that the promise which is by law implied from an account stated, even though the account is stated in writing, is not a promise made in writing, and therefore such a promise would not be one which would come within sub-s. 3.

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In the opinion of their Lordships this question does not arise because it appears to them reasonably plain that, in this particular case, the account stated is in fact an account from which there arises a promise made for good consideration to pay the balance shown in the account. Their Lordships think that what has been forgotten is that there are two forms of account stated. An account stated may only take the form of a mere acknowledgment of a debt, and in those circumstances, though it is quite true it amounts to a promise and the existence of a debt may be inferred, that can be rebutted, and it may very well turn out that there is no real debt at all, and in those circumstances there would be no consideration and no binding promise. But on the other hand, there is another form of account stated which is a very usual form as between merchants in business in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described. Probably the best authority for that definition on an account stated is that which was selected by Viscount Cave in the case of *Camillo Tank Steamship Co., Ld.* v. *Alexandria Engineering Works* (1), which was in the year 1921, although the account in that case was not an account of the nature described, because it was merely a repairer's account with the items probably only on one side. Viscount Cave, in dealing with the various descriptions in law of an account stated, said: "There is a second kind of account stated where the account contains items both of credit and debit, and the figures on both sides are adjusted between the parties and a balance struck. This is called by Blackburn J., in *Laycock* v. *Pickles* (2), a 'real account stated,' and he describes it as follows: 'There is a real account stated, called in old law an insimul computassent, that is to say, when several items of claim are brought into account on either side, and, being set against one another, a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due. It is not necessary, in order to make out a real account stated, that the debts should be debts in praesenti, or that they should be legal debts. I think equitable claims might be brought into account, and I am not certain that a moral obligation is not sufficient. It is to be taken as if the sums had been really paid down on each side; and the balance is recoverable as if money had been really taken in satisfaction; subject to this, that where some of the items are such that, if they had been actually paid, the party paying them would have been able to recover them back as on a failure of consideration, the account stated would be invalidated.' "

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(1) (1921) 38 Times L. R. 134, 143.
(2) (1863) 4 B. & S. 497.

By that must be meant, in view of many subsequent authorities, would be invalidated to the extent of those items which are objected to on that footing. Although Blackburn J. does not, in fact, deal with debts which are barred by the statute of limitation, yet he says it is not necessary that the debts should be in praesenti or that they should be legal debts. That is borne out by the fact, as is shown by the case of *Ashby* v. *James* (1), that though some of the items in the account are items which would have been barred by the statute of limitation, yet they are similarly deemed to have been paid. That was the precise position in *Ashby* v. *James*. (1)

In these circumstances this seems to their Lordships to be precisely the kind of account stated which was mentioned by Blackburn J. Here is an account which has been running over a period of about fifteen years, the remuneration has never been fixed; apparently the parties expected, though there was no legal bargain to that effect, that the remuneration should include the consideration of commission

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(1) (1843) 11 M. & W. 542.

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or share of the profits, or a bonus based upon the profits. Salary had never been quantified at all, and, more than that, the items of debits had never been agreed at all. So that at this particular time, when the employment had just ceased and when the ex-servant desired to receive his proper remuneration for the whole of that period, it was open to the employer to investigate each and all of the items that appeared in the books to determine for himself what the remuneration should be, and certainly to determine so as to bind the other side what his share of the profits, if any, should be. That was done. The man writes an account which was demanded by the servant for the express purpose of knowing what sum he would be entitled to get and which, it seems to their Lordships, was stated by the managing partner of the business, for the sole purpose of enabling the servant to know what his final remuneration was to be. To make quite clear that it was intended to express something in the nature of an obligation he authenticated the document —and that can be the only effect of that particular part of the transaction—by writing his signature over two 10-cent stamps.

In their Lordships' view, that was a plain case of a promise made to pay the balance for a good consideration. One cannot help thinking that if an account stated in those circumstances did not give rise in Kenya to the promise to pay, and for a good consideration, Kenya would be certainly without one of the most ordinary business facilities which has been common to everybody who carries on business under any system which incorporates any of the ordinary principles of English contract law.

For these reasons, it appears to their Lordships that the decision of the Court of Appeal was quite correct, though perhaps for different reasons from those which commended themselves to the members of the Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, and appellant must pay the costs of the appeal.

Solicitors for appellant: *Charles Russell & Co.*

Solicitors for respondent: *Hy. S. L. Polak & Co.*

[PRIVY COUNCIL.]

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Feb. 6.

OMANHENE KOBINA FOLI . . . . . APPELLANT;

AND

CHIEF OBENG AKESSE . . . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

*Gold Coast Colony—Tribal Lands—Disputed Area—Arbitration—Award—Evidence—Title—Arbitrary Division.*

In an action involving the extent of the tribal lands of two neighbouring chiefs in West Africa the appellate Court by consent referred to the final decision of a named arbitrator the question whether a tract of land shown on the survey plan belonged to the plaintiff or the defendant. The arbitrator, after hearing evidence and inspecting the disputed area, which was about 100 square miles in extent, awarded to the plaintiff the land on one side of a line which he drew upon the plan, being about a quarter of the whole, and awarded the rest to the defendant. From his award, which referred in detail to the evidence, it appeared that he based his award upon evidence of occupation and possession of seventeen small hamlets or places; of these three were within the part awarded to the defendant although the evidence mentioned was in favour of the plaintiff:—

*Held*, that it was competent to the arbitrator to award part of the area to the plaintiff and part to the defendant, but that the award should be set aside, because the evidence upon which it was based was not evidence of title to any area larger than that possessed nor as to any boundary, and the arbitrator had misconceived his duty under the reference in that he had based his award not upon title but upon what he considered was a fair division between the parties.

Judgment of the West African Court of Appeal reversed.

APPEAL (No. 76 of 1931) from a judgment of the West African Court of Appeal (May 12, 1930) dismissing a motion to set aside an award of Hall J., acting as arbitrator on a reference ordered by the Supreme Court of the Gold Coast Colony.

The plaintiff-appellant was the Omanhene (head) of the Adansi people, a tribe in Ashanti. The defendant-respondent was Ohene (chief) of the Akim people, resident mainly in the Gold Coast Colony; both the respondent and his deceased co-defendant were under the Omanhene of Akim-Abuakwa.

* *Present:* LORD THANKERTON, SIR LANCELOT SANDERSON, and SIR SIDNEY ROWLATT.

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The question referred was whether a tract of land, of about 100 square miles, belonged to the appellant or to the respondent.

The facts are fully stated in the judgment of the Judicial Committee.

1934. Jan. 18, 19, 22, 25. *Dunne K.C.* and *A. C. Hayford* for the appellant.

*Hon. Cyril Asquith* for the respondent.

Feb. 26. The judgment of their Lordships was delivered by

LORD THANKERTON. This is an appeal from a judgment and order of the West African Court of Appeal, dated May 12, 1930, dismissing a motion by the present appellant to set aside an award dated January 31, 1930, delivered by a judge of the Supreme Court of the Gold Coast Colony, as arbitrator on a reference ordered by the Full Court of the Supreme Court, sitting as the Appeal Court from the Chief Commissioner's Court of Ashanti, on an appeal from a judgment of the circuit judge of Ashanti, dated May 9, 1923, in an action in which the present appellant was plaintiff and the respondent and Odikro Asante, since deceased, were defendants.

The appellant not only challenges the award on certain grounds, but also challenges the validity of the order of reference by the Full Court of the Supreme Court, and it is therefore necessary to refer to the proceedings in the action prior to the order of reference.

On August 11, 1922, the appellant, who is Omanhene of Adansi in Ashanti, on behalf of his stool, issued a writ of summons in the Chief Commissioner's Court of Ashanti against Asanti, the Odikro of Edubiase, now deceased, and the respondent, Obeng Akesse, the Chief of Okyereso, who were both under the Omanhene of Akim-Abuakwa, in the Eastern Province of the Gold Coast Colony. The appellant claimed 500*l.* damages against both defendants jointly and severally for certain alleged acts of trespass and he also asked for a declaration as to the boundary between Adansi and Akim.

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At the material portion of its course the River Prah forms the political and territorial frontier between Ashanti and the Gold Coast Colony and has a southerly course. The learned trial judge describes the questions in issue before him as follows: "The plaintiff alleged that the first defendant sold a stretch of the River Prah between Ahudwi and Sumuoso, collected tribute at Ahudwi and Nyamibekyere on the right bank of the Prah, and destroyed a fishing weir erected by Akaakupeh, plaintiff's vassal, in the Prah at Sumuoso, and that the second defendant aided and abetted the first defendant in these acts. The plaintiff further alleged that these acts constituted a trespass on the territory of Adansi, and claimed 500*l.* damages against both the defendants jointly and severally. He also asked the Court to declare that the left bank of the Prah, from the Anum to the Offin, was the boundary between Adansi and Akim, and that the river and its right bank belonged to Adansi. The first defendant explained that he did not sell, but only mortgaged the river. Subject to this correction, both the defendants admitted the acts complained of, but said that the River Prah between the Numea (or thereabouts) and Ahudwi, together with a semi-circular tract of land on the right bank, were under Akim-Abuakwa, that the erection of the fishing weir constituted a trespass, and that the acts complained of were lawful and justified. Both the defendants, therefore, pleaded that they were not guilty of trespass, and not liable in damages."

After trial, the learned circuit judge issued a judgment, dated May 9, 1923, in which he found that, under a grant from the King of Ashanti, the plaintiff's title extended to the Prah and negatived the claim of the defendants to a title to any land on the right or west bank of the Prah; he further stated that he was not satisfied that the ownership of the river was vested in the plaintiff, so as to exclude, if he chose, the defendants from fishing in it, and he therefore found that neither party had proved its claim to the entire water rights; he rejected the claim for damages on account of the sale or mortgage of the river, but he held that the

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collection of tribute within the plaintiff's territory and the destruction of the weir were tortious acts and awarded the plaintiff nominal damages of 50*l*. Finally, the learned judge stated: "I make no declaration that the left bank of the Prah is the boundary of Adansi, and I have not sufficient information—nor, in view of my other findings, do I think it necessary—to make any declaration as to the extent of land owned by plaintiff (apart from the land in dispute)."

On November 12, 1927, the defendants obtained leave to appeal to the Supreme Court of the Gold Coast Colony in terms of s. 18 of the Ashanti Administration Ordinance (No. I. of 1902, in the 1920 revision). The defendant Odikro Asante had died, but it was agreed that the action should proceed against the other defendant. The appeal came on before a Full Court at Accra on March 14, 1929, and the Court was of opinion that the true issue between the parties, namely, whether the River Prah was the boundary between the parties or not, could not be satisfactorily determined on the evidence and findings before them, and that a survey was necessary to show exactly the area in dispute. Accordingly, by consent of counsel for both parties, a consent order was made on March 18, 1929, (*a*) setting aside the judgment appealed from, (*b*) ordering a survey of the disputed area to be made by an officer in the Survey Department, and (*c*) providing, on completion of the survey, for a further order by a Full Court under Order 52, sch. 2, Supreme Court Ordinance, referring to Hall J. the matters in difference between the parties.

The survey having been completed and a plan—No. C. 18—having been made in accordance therewith, a Full Court, on December 3, 1929, on the joint motion of parties, made the following order: "It is hereby ordered that His Honour Mr. Justice Roger Evans Hall, judge of the Supreme Court of the Colony aforesaid, be appointed as arbitrator herein and that the matters in difference between the parties herein, namely, whether the semi-circular tract of land edged red having as its base the River Prah edged green on the plan No. C. 18, signed by W. F. Mindham, officer in charge cadastral branch, dated August 15, 1929, is the property of aforesaid Kobina Foli, Omanhene of Adansi, or Obeng Akese, Ohene of Okyereso, be referred to the final decision of the said arbitrator. It is hereby ordered that the said arbitrator shall deliver his award within three months from date and shall have and exercise all powers given to arbitrators under Order 52, sch. 2, of the Supreme Court Ordinance."

The learned arbitrator proceeded with the reference, and, after hearing evidence at Accra for some thirteen days and spending a week on inspection of the disputed area and taking evidence there, made his award on January 31, 1930, under which he awarded and adjudged that as regards the area in dispute, namely, the semi-circular tract of land edged red having as its base the River Prah, the land to the west of a purple line he had caused to be drawn on the survey plan across the area in dispute was the property of the plaintiff, and the land to the east of the aforesaid purple line was the property of the defendant. The location of the purple line resulted in the plaintiff being awarded about one-fourth of the disputed area, the remaining three-fourths being awarded to the defendant, and the arbitrator made an award of costs in corresponding proportions.

On February 10, 1930, the plaintiff filed an application to the Full Court to set aside the award on a number of grounds. On the coming into force on March 1, 1930, of the West African Court of Appeal Order in Council 1928, the proceedings fell to be continued before the West African Court of Appeal, and on May 12, 1930, that Court refused to set aside the award and dismissed the motion. The plaintiff now appeals against that decision.

In the first place the appellant maintains that the order of the Full Court of the Supreme Court dated December 3, 1929, which referred the matter to arbitration, was incompetent and invalid, in respect that the power to order a reference conferred by Order 52, sch. 2, of the Supreme Court Ordinance, was not available in the case of an appeal from the Chief Commissioner's Court of Ashanti. Their Lordships have no difficulty in rejecting this contention as untenable, as r. 6, sch. 3, of the Supreme Court Ordinance provides with regard to appeals from the Chief Commissioner's Court of Ashanti—such as in the present case—" the Appeal Court shall hear, determine and deal with in the same way as if it was an appeal from a judgment of the Supreme Court." This makes available the very wide powers conferred by r. 26, Order 53, sch. 2. These provisions clearly warranted the Supreme Court's exercise of the power to order a reference under Order 52. It is hardly surprising that this contention was abandoned by the appellant's counsel in the Court below.

Rule 13 of Order 52 provides that no award shall be liable to be set aside except on the ground of " perverseness or misconduct " of the arbitrator. The appellant's grounds for setting aside the award fell under two heads—namely, (*a*) excess of jurisdiction appearing on the face of the award, and (*b*) error in law appearing on the face of the award, and amounting to misconduct or perverseness.

As regards excess of jurisdiction, the appellant maintained, in the first place, that, in view of the terms of the reference, it was only open to the arbitrator to award one or other of two boundaries—namely, either the boundary line edged red or that edged green. Their Lordships agree with the learned judges of the Court below in rejecting this contention, on the grounds stated by them. These two coloured lines set out the extreme claims of the parties, but the matter in difference between them was as to the exact line of the boundary. In their Lordships' opinion it was open to the arbitrator, if he found, as matter of title, that the existing boundary lay between these extremes, to make his award in accordance with such boundary.

In the second place, the appellant maintained that it appeared on the face of the award that the arbitrator had laid down a new boundary line, not as matter of existing title, but as a fair demarcation of boundary as between the parties. If this criticism can be justified, there can be no doubt that the award was beyond the scope of the reference, for the duty of the arbitrator was to ascertain a boundary existing as matter of title, and not to lay down a new boundary, however fair that might appear to be in light of the circumstances disclosed in the evidence. It is therefore necessary to consider carefully the award, in which the learned arbitrator has fully set out his views on the evidence and his reasons for his award.

In the first place, it appears from the award that the arbitrator did not regard any of the traditional or historical evidence as of assistance to him, and that he based his award on the evidence as to occupation and possession inside the area in question, as he also rejected the evidence given by defendant's witnesses from other tribes as to their boundary with the defendant.

The evidence as to occupation and possession within the area related to 36 so-called villages or hamlets or alleged ruins thereof, roads, tolls, and a fetish hill, Onuem Beppo, which is the most distinctive natural feature in the area. The evidence is referred to in considerable detail in the award. As regards 19 out of the 36 places the arbitrator states that the evidence rendered him no assistance and required no comment. That leaves only 17 of these evidently small places in an area of something like 100 square miles, and 7 out of these 17 places are either on or close to the Prah on the eastern edge of the area in dispute or on the western boundary of the area. Of the remaining 10 places, 3 of them—Adeamra, Asempaneye and Mpasem—are within the area awarded to the respondent, although the only evidence referred to in the award was in favour of the appellant.

In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area unless it can be reasonably attributed to a right to the whole area. The portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area. No such conditions exist in the present case. Alternatively, the occupation of a portion may be reasonably attributable to a right of ownership in a larger area, as, for instance, occupation of a portion of a field may be attributed to a right extending over the whole field. But the larger area must be defined ;

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in other words, it must be attributable to an existing boundary. There is no trace in the award of any such evidence or of any such question being considered by the learned arbitrator. As regards the fetish on Onuem Beppo, it clearly affords no evidence of an existing boundary on the line laid down by the arbitrator. On the other hand, it is used by the arbitrator as the main turning point for the demarcation of a new boundary. It may be added that the evidence as to roads and tolls was found by the arbitrator to be of no assistance.

Their Lordships are therefore of opinion that the learned arbitrator has misconceived his duty under the reference, in respect that by his award he has laid down a new boundary line, based on consideration of what would be a fair division of the disputed area between the parties. It follows that the award should be set aside on the ground that the arbitrator has acted ultra fines compromissi. It is unnecessary to consider the remaining contentions for the appellant or to express any opinion on them.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal of May 12, 1930, should be reversed, that the award of January 31, 1930, should be set aside, and that the case should be remitted to the West African Court of Appeal. The appellant will have the costs of this appeal and his costs in the Court below on his motion to set aside the award.

Solicitors for appellant : *A. L. Bryden & Co.*
Solicitors for respondent : *Linklaters & Paines.*

[PRIVY COUNCIL.]

J. C.*
1934
March 21.

K. D. JOSEPH AND ANOTHER . . . . . APPELLANTS;

AND

ESTHER PHILLIPS . . . . . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Canada (Ontario) — Will — Construction — Bequest — Personal Effects — "Including"—Contents of Desk—Choses in Action.*

A testator bequeathed to his niece "my personal effects in my room, including pictures roll-top desk and chiffonier complete with their contents." The desk had a drawer in which were three pass books referring to deposit accounts for a total sum of over $30,500, and nine promissory notes payable to the testator's order and not endorsed. Another part of the will provided for pecuniary legacies, including one to the testator's niece:—

*Held*, that the bequest was only of such things as could properly be treated as personal effects, and did not extend to the choses in action represented by the pass books and promissory notes.

*In re Robson* [1891] 2 Ch. 559 distinguished.

Judgment of the Court of Appeal for Ontario reversed.

APPEAL (No. 59 of 1933) from a judgment of the Court of Appeal for Ontario (October 3, 1933) reversing a judgment of Orde J. (September 18, 1931).

The appellants were the executor and executrix of the will of Abe Lyons, who died in Toronto on July 26, 1930. The respondent brought an action against the appellants in the Supreme Court of Ontario claiming a declaration that under the terms of the will she was entitled to certain bank deposit account books and promissory notes, and the money represented thereby, and for an order that the necessary documents be executed to complete the transfer to her.

The material provisions of the will and the other relevant facts appear from the judgment of the Judicial Committee.

The trial judge, Orde J., dismissed the action. He was of opinion that the deposit accounts and promissory notes were to be regarded as being in the desk at the testator's death, but that the gift to the plaintiff contained in clause 4 of the will was controlled by the words "my personal effects in my room" and did not extend to choses in action.

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD MACMILLAN, and LORD ALNESS.

The Court of Appeal reversed the decision. Mulock C.J.O. (with whose judgment Masten J.A. concurred) agreed that the bank deposit books and promissory notes were to be regarded as being in the desk at the testator's death. He held that having regard to the word "including" in clause 4 of the will, there passed to the plaintiff all the contents of the desk, whether or not they were within the description personal effects. In his opinion the bank pass books and promissory notes were capable of being the subject of a good donatio mortis causa, and by like reasoning of a testamentary gift; he held therefore that the plaintiff was entitled to the moneys and notes in question.

1934. March 6. *Tilley K.C.* for the appellants. Neither the bank deposit books nor the promissory notes were in the desk at the testator's death. They had been placed under the control of his executor, who acted bona fide and within his implied authority in moving them; his act was in effect the act of the testator. But in any case the gift in clause 4 of the will did not extend to choses in action. The clause confines the gift to personal effects; the word "including" does not extend the ambit of the gift. Other clauses of the will made pecuniary legacies, including a substantial one to the respondent; the testator cannot have intended by clause 4 to bequeath to her the large sum on deposit. The bequest which *In re Robson* (1) dealt with was not a bequest of personal effects. That decision, which applied *In re Prater* (2), shows merely that a gift of the contents of a box may extend to a chose in action if that appears to have been the intention of the testator; in this case his intention clearly was otherwise. The decisions mainly relied on in the Court of Appeal related to donationes mortis causa.

*Rowell K.C.* and *G. C. Lindsay* for the respondent. The desk was the customary receptacle for the deposit pass books

(1) [1891] 2 Ch. 559.

(2) (1888) 37 Ch. D. 481.

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and promissory notes. The executor had no authority to move them, and they should be regarded as being in the desk at the testator's death. The meaning of "personal effects" depends upon the context in which the expression is used and the circumstances. By the terms of clause 4 it there included the desk and its contents. "Including" is a word of enlargement: *Dilworth* v. *Commissioner of Stamps.* (1) That observation related to an interpretation clause in a statute, but it is of general application. The gift was in terms of the contents of the desk, and included the choses in action represented by the deposit pass books and the promissory notes: *In re Robson.* (2) Each of the deposit pass books stated the terms of the contract with the testator, and the gift of them, as of the promissory notes, carried the choses in action thereby represented: *Duffield* v. *Elwes* (3); *In re Weston* (4); *In re Dillon.* (5)

*Tilley K.C.* replied.

March 21. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal from a judgment of the Court of Appeal of Ontario, dated October 3, 1932, allowing an appeal from the judgment of Orde J.A., dated September 18, 1931.

The appeal raises a short question on the construction of the will of the testator, Abe Lyons.

The will was dated June 16, 1928. The testator died on July 26, 1930, after an illness which began early in June. On June 8, 1930, he was moved to hospital, where he remained until his death. During that time he was mentally incapable of looking after his affairs.

He was a member of the firm of Lyons & Marks, and spent most of his time travelling for the firm, only returning to town for week-ends. He lived alone in one room in Euclid Avenue, Toronto.

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(1) [1899] A. C. 99, 105.

(2) [1891] 2 Ch. 559.

(3) (1827) 1 Bli. N. S. 497.

(4) [1902] 1 Ch. 680.

(5) (1890) 44 Ch. D. 76.

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The appellant, Kenneth Joseph, was in the confidence of the testator, looking after his private financial affairs. He and the testator each had a key of a safety deposit box in their joint names at the Dominion Bank, in which securities of the testator were kept. The appellant opened this once a month for the purpose of detaching coupons and other purposes connected with the securities. He also, at the testator's request, procured a duplicate key of the drawer hereinafter mentioned in the desk in his room.

Under these circumstances, the testator made his will. It was prepared by his solicitor on his instructions.

The will is in paragraphs. Para. 1 contains the usual direction for payment of debts and so forth. Para. 2 contains a bequest of a specific legacy of a gold watch. Paras. 3 and 4 are in the following terms :—

" 3. I bequeath my jewels, including my diamond bar pin and extra stone in safety deposit vault at Toronto General Trust Corporation to my niece, Leah Singer, wife of Israel Singer.

4. I bequeath my personal effects in my room, including pictures, roll-top desk and chiffonier complete with their contents to my niece, Esther Phillips, wife of Nathan Phillips."

Para. 5 contains special directions for the disposal of his interest in his firm's business and paras. 6 to 16 contain a number of pecuniary legacies and a residuary gift in favour of the appellants, who are also appointed executor and executrix.

Among the pecuniary legacies were one of $5000 to the respondent and to each of her children living at his death $500.

The question arises with regard to the bequest of the personal effects contained in para. 4, and in particular as to the contents of the roll-top desk.

In the desk below the roll top there was a drawer. This is the drawer of which, as hereinbefore mentioned, the appellant Kenneth Joseph had a duplicate key. When the testator was taken ill in June, 1930, there were in this drawer three pass books referring to his deposit accounts, two in the Bank of Montreal and one in the Dominion Bank for a total sum of $30,575·62, and nine promissory notes, all payable to order and not endorsed and all of apparently little or no value.

Shortly after the removal of the testator to hospital the first appellant in (as their Lordships believe) perfect good faith and, as he thought, in the testator's interest and on his behalf, removed the pass books and the promissory notes from the drawer and deposited them in the safety deposit box above referred to. Their Lordships attribute no blame to the appellant for his action, but for the purposes of their decision assume that it did not affect any right of the legatee, and proceed to deal with the case as if the books and notes had formed part of the contents of the desk at the death of the testator. The desk also contained other things as to which no question has been raised.

The question is whether the bequest on its true construction is only of things which can properly be treated as personal effects, that is to say, physical chattels, having some personal connection with the testator such as articles of personal or domestic use or ornament, clothing furniture and so forth which would not include money or securities for money or whether in the actual contents it extends to the choses in action represented by the pass books and the promissory notes.

Their Lordships are of opinion that the former is the true construction. The bequest is one of personal effects and it cannot properly be said that by the mere direction to include the desk with its contents he intended so to enlarge the scope of the bequest as to include property not within the term "personal effects," and the inclusion of which would convert the bequest into a pecuniary legacy of over $30,000. Probably the testator regarded the pictures, the chiffonier and the desk as of a special description making it desirable ex abundanti cautela to mention them as being in his view covered by the terms of the bequest, and considerable support is afforded to this view by the bequest in para. 3. That is a bequest of jewels, including two particular jewels in a safety deposit vault and not in his own room. The use of the word "including" in this paragraph clearly did not extend the bequest to anything not a jewel. The frame of

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the will, the separation of the specific gifts of chattels from the pecuniary legacies, points in the same direction.

If the above view upon the construction is correct, the pass books and promissory notes not being within the description of personal chattels it becomes unnecessary to consider whether they were of such a nature that the bequest of them would have conferred on the legatee the right to the choses in action represented by them respectively. Their Lordships, however, must not be supposed to accept the views of the Court of Appeal on this point. With all respect they appear to have been misled by decisions on the law affecting donationes mortis causa. These gifts depend for their validity on the physical delivery to the donee of something the possession of which may confer a title to claim the real subject of the gift. In the case of a legacy the subject of it if a chose in action may be itself bequeathed, and the bequest entails on the executor the duty of placing the legatee in possession. The case *In re Robson* (1) was one purely of construction and depended on its own peculiar circumstances.

On the whole, their Lordships are of opinion that the appeal should be allowed and the order appealed from should be reversed and that of the Supreme Court restored, and that there should be no order as to the costs either in the Courts below or of this appeal. They will humbly advise His Majesty accordingly.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondent : *J. Nadler & Co.*

(1) [1891] 2 Ch. 559.

[PRIVY COUNCIL.]

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## OTTOMAN BANK OF NICOSIA . . . . APPELLANTS;

AND

## DASCALOPOULOS . . . . . . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CYPRUS.

*Cyprus—Currency—Rate of Exchange—Contract with Turkish Corporation—Pension based on salary.*

In 1905 the respondent became a member of the pensionable staff of a Turkish banking corporation of which the appellants were the Cyprus branch. By the contract then made he was entitled on retiring to a pension based upon his salary in the previous year. His salary was a sum in Turkish pounds. Before the war the Turkish pound was a coin of specified gold content, but in 1915 paper money was issued by the Turkish Government and made legal tender in Turkey. The respondent, who previously had served in Turkey, was transferred to Cyprus in 1923, and was employed there by the appellants until the end of 1931, when he retired. In Cyprus his salary was paid at the rate of 100 Cyprus pounds per 110 Turkish pounds. That rate was adopted when both England and Turkey were on the gold standard, and was based upon the gold content of the English sovereign, which was interchangeable with the Cyprus pound, and of the Turkish pound. The Cyprus currency had since depreciated in terms of gold:—

*Held*, that the respondent's pension was payable in Turkish gold pounds converted into Cyprus currency at the rate of exchange on the day of each payment.

*Ottoman Bank* v. *Chakarian* [1930] A. C. 277 explained and distinguished.

Judgment of the Supreme Court of Cyprus affirmed.

APPEAL (No. 54 of 1933) from a judgment of the Supreme Court of Cyprus (April 7, 1933) affirming a judgment of the District Court of Nicosia-Kyrenia (August 8, 1932).

The respondent brought an action in the District Court against the appellant bank claiming a declaration that on retiring from their service he was entitled to a pension in Turkish gold pounds payable to him in currency constituting legal tender after conversion at the rate of exchange of the day of each monthly instalment.

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* *Present*: LORD BLANESBURGH, LORD MERRIVALE, and SIR SIDNEY ROWLATT.

The Supreme Court (Strong C.J., Thomas and Sertsios JJ.), affirming the judgment of the District Court, made a declaration determining the amount of the pension in Turkish gold pounds and declaring it to be payable in the manner prayed.

The facts appear from the judgment of the Judicial Committee.

1933. Jan. 18, 19, 22, 25. *Gavin Simonds K.C.*, *Ronald Smith* and *T. W. G. Barry* for the appellants.

*Sir William Jowitt K.C.* and *Kenelm Preedy* for the respondent.

Reference was made to *Ottoman Bank* v. *Chakarian* (1), *In re Chesterman's Trusts* (2), *Broken Hill Proprietary Co.* v. *Latham* (3), and Feaveryear's "The Pound Sterling" (1931, Oxford), p. 96.

April 12. The judgment of their Lordships was delivered by

Lord Blanesburgh. This is an appeal from a judgment of the Supreme Court of Cyprus affirming the judgment of the District Court of Nicosia at the trial.

The appellants, defendants in the action, are the Ottoman Bank of Nicosia, and the respondent, the plaintiff, is a former official of the bank. Prior to his retirement on December 31, 1931, the respondent was serving in the Larnaca branch in Cyprus and the one question which survives for determination upon the present appeal is whether the pension to which, in accordance with the terms of his employment, he then became entitled is, as both Courts in Cyprus have held, a pension payable in Turkish gold pounds translated into Cyprus currency at the exchange of the day, or whether, as the appellant bank contends, it is due only in pounds of Turkish currency, or, whether, so or not, is in Cyprus payable only in the currency of the Island at the fixed rate of exchange of 100 Cyprus for 110 Turkish pounds, and that whether the salary pounds be gold or not. The respondent's pension, in other words, according to the view of the bank, so far from being based upon gold, is really in Cyprus a sum expressed in Cyprus currency fixed and invariable, whatever, either intrinsically or in exchange, the value of that currency may be or become. As the Cyprus pound is no longer on a gold basis, and bears in actual exchange to a Turkish gold pound a very much higher ratio than 100 to 110, the question at issue is even now one of substantial consequence to the respondent. To the bank the issue may also be of general importance as affecting the pension claims of other of its retired officials in a position similar or analogous to that of the respondent.

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(1) [1930] A. C. 277.

(2) [1923] 2 Ch. 466.

(3) [1933] Ch. 373.

In 1903 the respondent entered the service of the Imperial Ottoman Bank, with which, for all present purposes, the appellant bank may be regarded as identical. In March, 1905, he joined the permanent and pensionable staff, and he then signed a declaration by which he bound himself to adhere to the regulations governing the pensions and superannuation fund of the bank, which, adopted by the Direction Générale in December, 1898, had been in force as from January 1, 1899. These regulations, as the respondent then further declared, formed an integral part of the conditions of his engagement with the bank.

The regulations are voluminous. Only a few of the articles constituting them need, however, here be specifically referred to. By article 2 the general management of the bank may at all times of the year discharge an employee, but (article 3) he receives an indemnity from the pension fund applicable to his case. Each employee (article 9) cedes to the bank prescribed proportions of his fixed salary and increments. These sums are retained by the bank each month, and lodged by it to the account of the fund. The bank, for its part, is to lodge, every month, to the same account, 6 per cent. of the salaries of the personnel and undertakes to make good the deficiency, if the total of the fund, as so composed, is insufficient to meet pensions then already granted.

By article 14 the amount of a retired employee's pension is fixed "on the basis of the salary which [he] received on December 31 of the year preceding that in which he is retired."

The date applicable to the respondent's case accordingly is December 31, 1930. By article 15 the amount of pension is calculated for 10 full years' service at 30 per cent. of the employee's annual fixed salary, with 2 per cent. for each of the subsequent years. Article 30 is striking. "The general management reserve unto themselves the right to modify these regulations every time they think it necessary, *and in so far as the rights and interests of the personnel will not be injured by these modifications*."

It is complained that the general management have, on occasions, purported to exercise this power without due or any regard to the qualification imposed by the words above italicized. The powers of the bank in this behalf are not, however, in the present case directly in question. But incidentally the article must again be referred to.

There is in the regulations no direct statement as to the currency in which any salary is to be paid. There is, however, in article 16, expressed in Turkish pounds, a minimum as well as a maximum pension which employees of a particular type may claim. A similar provision in the case of a pension payable to the widow of a deceased employee is to be found in article 22. It may also be observed that at the date of the regulations the only Turkish pound either known or (with the possible exception of pounds of equivalent intrinsic value issued in paper by the bank itself), in circulation, were gold coins of a special gold content, and their Lordships can have no doubt that the reference in the regulations was a reference to these Turkish gold pounds.

Nor is the salary to be paid to the respondent referred to in any document then signed by him. The amount was no doubt agreed, and increased from time to time. That it was, ab initio, expressed in terms which in the result made it payable in Turkish gold pounds can hardly be doubted. It is, indeed, stated in evidence by the bank that in Turkey before the war the employees' salaries were always paid in Turkish gold pounds.

Here it may be convenient to allude to the origin, with the meaning to be attached to it, of the conversion of Turkish into Cyprus pounds at the rate of 110 to 100. To this conversion,

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as has already been indicated, and as will later more clearly appear, final importance is attached by the bank. Cyprus pounds were here the equivalent of the English sovereign and this particular ratio which as is explained was always followed in the books of the bank in relation to English sovereigns represented a real ratio founded on the actual gold content of two gold coins—a Turkish pound and an English sovereign. In fixing it, the gold content of the Turkish pound was taken to be 7·216 grammes, and that of the English sovereign 7·988 grammes. It is further in evidence and it may here be conveniently added that during the term of the respondent's service in Cyprus—certainly at the critical date, December 31, 1930—the Cyprus £1 note and the sovereign were in practice interchangeable. In Cyprus, said Mr. Jones, a witness for the bank, there was no difference between gold and paper.

Now the respondent, on the permanent staff of the bank since March, 1905, was, in 1923, serving temporarily in Constantinople. He had previously been employed in branches in other parts of Turkey. In 1923 he was transferred to Cyprus, and became chief of the Larnaca office. In that post he remained until December 31, 1931, when he was retired. Thenceforth he was eligible for pension, and it is not now in question that in accordance with the pension regulations above summarized, and in view of his length of service, the respondent was entitled to a monthly pension of 64 per cent. of the fixed salary he was receiving on December 31, 1930. It is now further agreed that the fixed or pensionable salary of the respondent on that date was one which, expressed in terms of Turkish currency was a salary of 45 Turkish pounds per month. The first, and it may be the final, question for determination is whether these Turkish pounds were any other than Turkish gold pounds representing the pensionable portion of the salary to which, under the terms of his employment, the respondent was then entitled.

It is vital to remember in the consideration of this question that the respondent at the date of his retirement was being employed outside Turkey. Had he then been employed within Turkey—for example, in Constantinople where the official in

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the *Ottoman Bank* v. *Chakarian* (1) had been employed, different considerations as to his pension rights might have arisen. Here, however, their Lordships are concerned only with the case of an official of the bank who had continuously for about eight years before his retirement been serving abroad —to wit in Cyprus.

Now it is in evidence that on transfer for service abroad no fresh agreement was normally entered into as to the salary payable to the transferred employee by the bank. In the particular case of the respondent, however, when in 1923 he was transferred to Cyprus, he was informed by the director of the bank, so he says, that his salary—then a salary of 45 Turkish pounds a month, would be as formerly, and that he would draw it in parity, that is he would draw salary at 110 Turkish gold pounds to 100 English. Objection was taken by the bank to the admission of this evidence ; but the fact that the Turkish pounds on which the translation into Cyprus or English currency depended were throughout the respondent's service Turkish gold pounds is, their Lordships think, clearly shown by what actually happened in Cyprus.

First on May 21, 1926, the respondent was granted an increase in his emolument—a so-called indemnity—expressed as 2 Turkish pounds to be added to the 45 Turkish pounds he was then receiving. He was granted a similar increase as from January 1, 1929. It is not open to doubt, their Lordships think, that in each case these were and were intended to be additions of two Turkish gold pounds to the fixed salary then described in the same currency.

But the most conclusive evidence as to the nature of the Turkish pounds in which the respondent's salary in Cyprus was expressed is supplied by the salary book of the bank framed in terms which for the present purposes are of great significance. Every month the respondent on receipt of his salary was required to sign and did sign the salary book. The details specified are always in the same form. For convenience their Lordships take the entry which, of those printed in the appendix, is latest in date. It is the entry for January, 1929.

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(1) [1930] A. C. 277.

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There, in the first column the name of the respondent appears at the head of the "Directing Staff." In the second column headed "Salary £tq." his salary is entered as 45. The third column is headed "Indemnity £tq." In this column the respondent's two increases are entered as £tq. 4. Passing over columns 4 and 5 indicating deductions from the £tq. 49 shown in columns 2 and 3, we find under the sixth column headed "Net salary in £tq." that the respondent's net salary is brought out at £tq. 46.75. The seventh column, the most important perhaps of all in this connection, is headed "Equivalent in £ s cp": and the respondent's equivalent is entered at £42 10s. Then under the eighth column headed "Total in £ s cp, the same figure as in column 7 is brought out—namely: £42 10s. The whole is signed by the respondent.

This entry appears to be free from ambiguity. That the £tq. 45 and £tq. 4 are Turkish gold pounds is proved by the fact not really in dispute—that the so-called "equivalent" in column 7 is the Cyprus equivalent for a Turkish gold pound and for nothing else. Equally clear is it, when the actual facts are remembered, that the real function of this column was to equiparate in the Cyprus currency, in which payment was actually being made and accepted, the respondent's contractual salary in Turkish gold pounds.

The bank does not accept this view. Even if, contrary to its submission, based upon reasons later to be stated the Turkish pounds referred to are held to be Turkish gold pounds, even so, it contends that the respondent is not entitled, in Cyprus at all events, to any payment other than one in Cyprus currency exchanged at the rate of 110 Turkish pounds for 100 Cyprus pounds. Their Lordships are unable to accept this contention. They are satisfied that the "equivalent" in Cyprus currency ascertained by that formula was, and was intended to be, a real equivalent. It was merely exegetical of the basic contract. It was a formula applicable only where the result was to produce parity in terms of gold. To both parties it was a convenience that the salary of the respondent, stationed in Cyprus as he was, should be paid in Cyprus currency. But the salary remained a salary due in Turkish gold pounds, and if it

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had been tendered by the bank in that form it must have been accepted by the respondent. In short, these monthly entries express with clearness, as their Lordships think, the respondent's contractual rights in the matter of salary, and it being now agreed that his pensionable salary on December 31, 1930, was 45 Turkish pounds a month, they justify the declaration of the learned trial judge that the respondent is entitled to a monthly pension of a sum equal to 28·80 Turkish gold pounds; with as a necessary corollary, now that Cyprus currency has so depreciated in terms of gold, that the " equivalent " in Cyprus currency must be calculated according to the rate of exchange, whatever it may be, prevailing at the date when each instalment of pension becomes due.

Their Lordships have reached this conclusion without so far considering the possible effect upon it of the fact that whereas up to 1915 there was substantially no Turkish pound existing other than a Turkish gold pound, there was brought into being on April 15, 1915, as the result of an Ordinance of that date, an issue of Turkish paper pounds to which were attached the privileges specified in the Ordinance.

The bank goes so far as to say, and it relies in support of its contention on a decision of this Board in the case already cited, that as one result of the issue of these paper pounds, the salaries of the bank's employees, whatever may have been the case before, ceased to be payable in gold. So far, however, as the respondent's salary is concerned, it will be found, their Lordships think, that for so long as he was employed outside Turkey—and that is the only case with which their Lordships are concerned—his position was unaffected either by the ordinance or by any pronouncement of the bank following upon it. In order, however, to appreciate the true position in this respect and also to ascertain the bearing, if any, of the decision in *Chakarian's* case (1) upon the respondent's rights, it is necessary to go into some little detail.

By article 1 of the ordinance in question the Ministry of Finance was authorized to issue £tqs. 6,583,094 of paper money against the deposit of effective gold for 150,000,000

(1) [1930] A. C. 277.

francs. By article 2 the acceptance and circulation of this paper money exactly in the same way as cash was made obligatory in all the territory of the Empire in all transactions, either between private parties and the Government or between private parties themselves. By article 3 the counter-value of this paper money was to be reimbursed in gold at sight and to bearer, six months after the conclusion of peace at Constantinople. By article 4 such of the paper money as should not have been presented for reimbursement within the five years following the date fixed in article 3 was to be prescribed to the profit of the treasury.

Now the effect of this ordinance is of course a matter of Turkish law, with reference to which no evidence was tendered at the trial. But its somewhat remarkable provisions are alluded to in the Supreme Court. It is pointed out by Sertsios J. that the notes were to be legal tender only up to a date of six months after peace, an event which the Chief Justice points out occurred on August 6, 1924. It may also be questioned whether these currency notes were ever made legal tender for any payment under a Turkish contract which by that contract had to be made outside of Turkey. These matters however have not been discussed in the Courts below and their Lordships in the absence of evidence as to Turkish law, are not in a position to pronounce upon them now. They need not, however, do so ; for it is clear to them that not even in Turkey did the bank ever assert a right to meet the claims of its employees hitherto paid in Turkish gold pounds by tendering them Turkish paper pounds. So far as the employees of the bank outside of Turkey were concerned, there is no indication that any change at all was made in the manner of paying their salaries hitherto always paid on a gold basis. As for the employees in Turkey proper the bank did from time time purport to alter the salaries, but nearly always by way of increase. In the present case, which is not concerned with an employee serving in Turkey at any relevant date, these variations are not important, and their Lordships are, for present purposes, content to accept the summary statement of the Chief Justice with reference to them that salaries in

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Turkey were being paid on a gold basis, each employee receiving in Turkish currency a sum which had Turkish gold pounds been procurable would have enabled him to obtain these to a number equal to the bank's original figures of his month's salary.

The bank, however, in 1920 made the following notable pronouncement applicable to the staff of Constantinople and the agencies in Turkey :—" As from January 1, 1920, the gross monthly salary of each employee will be converted into pounds sterling at the rate of 110 Turkish pounds for 100 pounds sterling and the proceeds of conversion so obtained will be paid to each employee in Ottoman treasury notes at the average selling price of the pound sterling registered at the head office during the three months immediately preceding the current month."

This method of payment was followed for nearly a year and a half. It was superseded by a decision of May, 1921, of the management committee, arbitrarily fixing 451 piastres—a number far less than the proper number in exchange—as the number to be taken as the equivalent of the pound sterling and finally, in 1923, after the respondent had gone to Cyprus, the bank adopted a method of directly converting the Turkish gold pound, "the gross monthly salary," into paper by treating it as the equivalent to 410 piastres.

Now the action of the bank in this matter has not passed unchallenged in the Cyprus Courts. It has, in the case of *Esmerian* v. *Ottoman Bank* (1), been condemned as an attempt by the bank, under cover of article 30 of the pension regulations above set forth, to alter a fundamental term of their contracts in the case of its employees in Turkey. This may or may not be so. Upon such a question their Lordships in this case naturally express no opinion. But they draw attention to its existence in order that the meaning and effect of the judgment of the Board in *Ottoman Bank* v. *Chakarian* (2) may be made clear.

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(1) S. C. of Cyprus, June 19, 1929; Record p. 124; unreported. The judgment was affirmed by the Ct. of App. on March 8, 1930.

(2) [1930] A. C. 277.

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That case is claimed by the bank as an authority for the proposition that the salaries of the bank's employees are no longer payable in gold. This claim seems to rest upon a complete misapprehension of the decision. The plaintiff there was an employee of the bank who, when employed at the Constantinople office, had, as he alleged, been wrongfully dismissed. His action against the bank, brought in Cyprus, was one for damages for such wrongful dismissal. For the purpose of assessing the damages, and only for that purpose, it was necessary to value the plaintiff's pension rights on the footing that he had been retired at the date when he was dismissed. He had, in fact, received on December 31 of the year preceding his dismissal, without protest or objection on his part, his salary calculated according to the above decision of May, 1921. In these circumstances it was held by the Board that for the purpose of fixing his pension rights the plaintiff was, under article 14 of the regulations, bound by and could not go behind that receipt—which as a receipt of 451 piastres for every pound sterling, was an essential part of the decision of May, 1921. The validity of the decision of May, 1921, was not itself in question : it was assumed to be valid : the only question under discussion was what it meant, and upon that question practical agreement was reached during the argument. In the judgment of the Board therefore, delivered by Lord Thankerton, it was not necessary to do more than record the result. It follows that so far as any general question as to payment in gold is concerned, the decision is only relevant now as showing that by common consent the " gross monthly salary " of the pronouncement of January, 1920—the exact counterpart of the respondent's £tq. 45—was assumed to be, even in Turkey, a salary in Turkish gold pounds. But the case has no further application to the present, which relates to an employee of the bank serving out of Turkey ; nor can it be any authority in any case, even of an employee serving in Turkey, where the validity of the decisions of May, 1921 and 1923 is not admitted or, if questioned, is not established.

In the view their Lordships take of the case it is unnecessary, they think, to deal with other questions canvassed during the

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argument. For the reasons given they are of opinion that the concurrent judgments of the Courts in Cyprus to the effect above stated were in the result right, and they will accordingly humbly advise His Majesty to dismiss this appeal.

Their Lordships understand that the costs have been arranged between the parties.

Solicitors for appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for respondent: *Gisborne & Co.*

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[HOUSE OF LORDS.]

H. L. (E.)*
1934
*March* 6.

THE MAYOR, ALDERMEN AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF STEPNEY . . . . APPELLANTS;

AND

JOHN WALKER AND SONS, LIMITED RESPONDENTS.

*Rates and Rating—Derating—Quinquennial Valuation List—Industrial hereditament omitted from Part II.—Rating Authority—Breach of public duty—Party aggrieved—Special statutory remedy—Practice—Crown Office—Mandamus—Union Assessment Committee Act,* 1862 (25 *&* 26 *Vict. c.* 103), *s.* 18—*Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 11, 14, 41—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 1; *s.* 4, *sub-s.* 1—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 70, *sub-s.* 4.

The occupiers of hereditaments in the Metropolis claimed that the premises were industrial hereditaments within the meaning of s. 1, sub-s. 1, of the Rating and Valuation (Apportionment) Act, 1928, and as such should be inserted in the Special List to be prepared by the rating authority under s. 2 of the First Schedule to that Act. The rating authority rejected the claim, and none of the hereditaments were included in the Special List. After objection taken before the Assessment Committee and an appeal to the Court of Quarter Sessions by the Revenue Officer the justices decided, subject to a special case for the opinion of the King's Bench Division under s. 40 of the Valuation (Metropolis) Act, 1869, that the hereditaments were not industrial hereditaments, and allowed the appeal of the Revenue Officer.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

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Before the special case was heard by the King's Bench Division the rating authority made out the new valuation list, in which one only of the hereditaments appeared in Part II. of the list as an industrial hereditament. The assessment committee altered the list by removing the one hereditament from Part II., and finally approved the list so altered. Afterwards the special case above mentioned was heard by the King's Bench Division and the Divisional Court held that all the hereditaments were industrial hereditaments for the purposes of the Special List. The occupiers made no claim in the form prescribed by s. 70, sub-s. 4, of the Local Government Act, 1929, to have the hereditaments inserted in Part II. of the new valuation list. They requested the rating authority to insert the hereditaments in Part II. of the new list. The rating authority refused to do this. The occupiers then obtained a rule nisi for a writ of mandamus commanding the rating authority to insert in Part II. of the new valuation list all the hereditaments as being industrial hereditaments. The Divisional Court subsequently ordered that the rule nisi should be discharged. The occupiers appealed from this order, and the Court of Appeal ordered that the writ should issue. On an appeal by the rating authority:—

*Held*, that the rule should be discharged for the following reasons:—

(1.) because by s. 32 of the Union Assessment Committee Act, 1862, and ss. 19 and 40 of the Valuation (Metropolis) Act, 1869, a special course to be followed by a party aggrieved by a valuation list has been prescribed—namely, by way of objection taken before the assessment committee, appeal to quarter sessions, and appeal from that Court by special case to the King's Bench Division; from which Court, by other statutes, there lies an appeal to the Court of Appeal, and from the Court of Appeal to this House;

(2.) because the occupiers had omitted to make a claim under s. 70, sub-s. 4, of the Local Government Act, 1929;

(3.) because the rating authority has no power except under s. 41 of the Valuation (Metropolis) Act, 1869, to make any alteration in a valuation list after it has been finally approved by the assessment committee;

(4.) because it did not follow from the decision of the King's Bench Division in regard to the special list that the hereditaments must appear as industrial hereditaments in the valuation list;

(5.) because there had been no failure in the performance of their duty by the rating authority.

*Rex* v. *City of London Assessment Committee* [1907] 2 K. B. 764, approved.

Order of the Court of Appeal reversed.

APPEAL from an order of the Court of Appeal allowing an appeal by John Walker and Sons, Ld. (hereinafter called the prosecutors), from an order of the King's Bench Division discharging a rule nisi for a mandamus previously granted at the instance of the prosecutors. The Court of Appeal ordered that a writ of mandamus should issue directed to the

Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney, the rating authority for the parish of Stepney, commanding them to insert four hereditaments, occupied by the prosecutors, in Part II. of the Quinquennial Valuation List, 1930, as being industrial hereditaments within the meaning of the Rating and Valuation (Apportionment) Act, 1928.

By s. 3, sub-s. 1, of that Act and the First Schedule thereto provision is made for bringing into conformity with the Act valuation lists which should be in force on October 1, 1929, by directing the preparation of a Special List of all industrial hereditaments for which the occupiers thereof had in the prescribed manner claimed the character of industrial hereditaments. The prosecutors duly claimed that the four hereditaments were industrial hereditaments, but the rating authority rejected the claims and in the draft Special List prepared by the authority none of the hereditaments were included as industrial hereditaments. On July 29, 1929, the prosecutors objected to the list on the ground that the hereditaments were not included therein. On October 10, 1929, the Assessment Committee of the Stepney assessment area heard the objection of the prosecutors and decided in their favour that the hereditaments were industrial hereditaments and directed that they should be, and accordingly they were, included in the Special List. On October 26, 1929, the Revenue Officer of the assessment area appealed to the Quarter Sessions for the County of London, and that Court on December 11, 1929, decided that the hereditaments were used primarily for the purposes of distributive wholesale business, and were not industrial hereditaments and, subject to the stating of a Special Case in accordance with s. 40 of the Valuation (Metropolis) Act, 1869, allowed the appeal of the Revenue Officer and ordered that the hereditaments should be deleted from the Special List. After a delay of some months, on March 6, 1931, a Special Case for the opinion of the High Court of Justice was stated and signed.

Meanwhile it had become the duty of the rating authority under s. 46 of the Valuation (Metropolis) Act, 1869, to make a new valuation list (hereinafter called the Quinquennial Valuation List 1930). Accordingly on January 1, 1930, they gave notice to the prosecutors requiring them to make returns of the annual value of the four hereditaments in question. On January 24, 1930, the prosecutors made returns stating that the hereditaments were occupied for the purpose of "blending, reducing, manufacturing, bottling, labelling, casing and generally adapting whisky for sale." The rating authority in making the Quinquennial Valuation List 1930 placed one of the four hereditaments in Part II. as an industrial hereditament; the other three hereditaments they placed in Part I. as being neither industrial nor freight transport hereditaments, and in this form they deposited the list at the municipal offices of the Corporation of Stepney, and on August 2, 1930, they gave notice to the prosecutors that they had done so.

The Assessment Committee of the rating area, acting under s. 20 of the Union Assessment Committee Act, 1862, altered the Quinquennial Valuation List, 1930, by removing from Part II. of the list the one hereditament which had been inserted therein and, having approved and signed the list as so altered, sent it back to the rating authority to be redeposited. The rating authority redeposited the list, and on March 19, 1930, the Assessment Committee finally approved the list. By virtue of s. 43 of the Valuation (Metropolis) Act, 1869, the Quinquennial Valuation List, 1930, came into force on April 6, 1931.

The Special Case stated by the Court of Quarter Sessions was heard before a Divisional Court on April 23, 1931. The Court held that all four hereditaments were industrial hereditaments, and ordered that the orders of Quarter Sessions dated December 11, 1929, should be quashed and that the four hereditaments should be entered in the Special List. On July 1, 1931, the Court of Quarter Sessions entered judgment for the prosecutors in accordance with the order of the King's Bench Division, and the four hereditaments were re-inserted in the Special List.

The prosecutors did not make any claim under or in the form prescribed by s. 70, sub-s. 4, of the Local Government Act, 1929 (1) to the rating authority that the four hereditaments ought for the purposes of the valuation list to be treated as industrial hereditaments. Neither did they make any objection before the Assessment Committee to the new list, whether as first made and deposited by the rating authority or as redeposited by them with the alterations made by the Assessment Committee.

On April 11, 1932, the prosecutors requested the rating authority to insert the hereditaments in question in Part II. of the new list. The rating authority refused to comply with this request, and on April 27, 1932, the prosecutors applied for and obtained a rule nisi calling upon the rating authority to show cause why a writ of mandamus should not issue commanding them to do so, on the ground that "the said hereditaments being as was determined by the order of" the King's Bench Division "dated April 3, 1931, industrial hereditaments within the meaning of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, the Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney acting as the rating authority within whose area the said hereditaments are situate on demand made by the prosecutors, Messrs. John Walker and Sons, Ld., wrongfully refused to insert the said hereditaments in Part II. of the Quinquennial Valuation List, 1930, as they were in law bound to do."

On July 22, 1932, the rating authority appeared to show cause before a Divisional Court of the King's Bench Division. The Court (Lord Hewart C.J. and Avory and Humphreys JJ.) held that the rating authority had no power to comply with the prosecutors' request and discharged the rule. The prosecutors appealed to the Court of Appeal. On November 29, 1932, Lord Hanworth M.R. and Slesser and Romer L.JJ. allowed the appeal and ordered the writ of mandamus to issue.

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(1) Local Government Act, 1929, s. 70, sub-s. 4: "Notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928, no hereditament shall, for the purposes of any valuation list which will come into force after the appointed day" (October 1, 1929, see s. 134), "be treated as an . . . . industrial . . . . hereditament unless it was so treated for the purposes of the last preceding valuation list except upon a claim that it ought to be so treated being made to the rating authority by the owner or occupier of the hereditament in the prescribed form, which shall be supplied by the rating authority on the demand of the owner or occupier of any hereditament in their area."

The rating authority appealed to this House.

Jan. 30. *Wilfrid Greene K.C.* and *Hubert Hull* for the appellants. In order to appreciate the rights and obligations of the various bodies concerned in the valuation and rating of hereditaments in London, it is necessary to understand their various functions and duties. These are prescribed by sections of five statutes: the Union Assessment Committee Act, 1862, hereinafter called the Act of 1862; the Valuation (Metropolis) Act, 1869, hereinafter called the Act of 1869; the Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90), in so far as it relates to London; the Rating and Valuation (Apportionment) Act, 1928, and the Local Government Act, 1929 (19 Geo. 5, c. 17). When the relevant sections of these statutes are considered it is submitted that the mandamus commands the appellants to perform an act which is either futile or impossible. The writ commands them "to insert the respondents' hereditaments in Part II. of the Quinquennial Valuation List, 1930, or such list as is now in force."

The first question is what is meant by the Quinquennial Valuation List, 1930? Valuation lists owe their origin to the Act of 1862. By s. 6 of the Act of 1869 the rating authority (formerly the overseers of the parish, later the Borough Council: London Government Act, 1899 (62 & 63 Vict. c. 14), s. 11, sub-s. 1; who are now the rating authority by virtue of s. 7, sub-s. 2 (*b*) of the Act of 1928) have to make out in duplicate a list of the rateable hereditaments in their parish. The list when made by the rating authority must be deposited by them in the place where the rate books are deposited and kept: Act of 1862, s. 17. One copy was formerly delivered to the Board of Guardians of the Poor Law Union: Act of 1862, s. 17; but that body is now represented by the rating authority themselves: Act of 1928, Sch. 10, s. 24. They then give public notice of the deposit, and all persons assessed may inspect it: Act of 1862, s. 17. One copy of the list therefore remains with the rating authority.

Fourteen days after they have given notice of the deposit the rating authority must transmit the list to the Assessment Committee, and any ratepayer may inspect it. Then any rating authority having reason to think that the parish is aggrieved, or any person who may feel himself aggrieved, by any valuation list on the ground of any unfairness or incorrectness in the valuation of any hereditaments included therein, may within 28 days after notice of the deposit give to the Assessment Committee notice of the objection: Act of 1862, s. 18; Act of 1869, s. 11. The Assessment Committee may at their own instance make such alterations in their copy of the valuation list as seem to them proper. Within a specified time after receiving the list from the rating authority the Assessment Committee must hold a meeting for the purpose of hearing objections to the list: Act of 1869, s. 42, sub-s. 4. Then, when they have heard and determined all such objections as aforesaid and made such alterations as seem to them proper, they must approve the list under the hands of three of their members present at the meeting: Act of 1862, s. 20. Then the Assessment Committee send the valuation list to be redeposited and give a notice of the redeposit similar to that required in the first instance, and appoint a day for the hearing of objections to the list as altered: Act of 1862, s. 21. When they have finally approved the list they are to cause the totals of the gross and rateable values in the list to be ascertained and inserted in the list, and three members of the Committee present at the meeting at which the list is finally approved sign at the foot thereof a declaration and certificate in the form prescribed: Act of 1869, s. 14. One copy so certified was sent formerly to the clerk of the managers of the metropolitan asylum board, but now to the clerk of the London County Council: Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 44, and Local Government Act, 1929, Sch. 10, s. 23, sub-s. 11. After performing certain duties in relation thereto the clerk returns this copy to the Assessment Committee: Act of 1869, s. 16. The other duplicate is to be sent to the rating authority: Act of 1869, s. 14.

In the event of an appeal to the justices in Quarter Sessions for the purpose of questioning any decision of the Assessment Committee the valuation list must be produced at the Sessions by the clerk to the Assessment Committee. Any alteration is to be made by the justice acting as chairman of the Sessions in that list, and to be initialed by him. Notice of every alteration is to be sent by the clerk of the Assessment Committee to the rating authority, and the alteration is to be entered by the clerk of the Assessment Committee and by the rating authority on the duplicates respectively in their possession: Act of 1869, s. 41. Notice of every alteration in the total of the gross and rateable value in any valuation list in consequence of any decision on any appeal to the Sessions or a Superior Court is to be sent in writing by the clerk of the Assessment Committee to the clerk, formerly of the metropolitan asylum board, but now of the London County Council, who shall send in writing the altered total to every authority having power to levy or make any rate or assessment: Act of 1869, s. 41.

A valuation list may be proved by production of a duplicate or copy of such list purporting to be certified to be a duplicate or a true copy by the clerk of the Assessment Committee that approved it, and the certificate shall state that the alterations (if any) made in the list in consequence of the decision on any appeal have been correctly made in the duplicate or copy so produced, and the clerk on application shall furnish a copy to any rating authority on payment of a specified sum: Act of 1869, s. 64.

The duplicate of the valuation list approved by the Assessment Committee and sent to the rating authority is to be deemed to be part of the rate books of the parish, and must be produced by the rating authority before the justices on any application for allowance of rates, and on any appeal under any Act, and on any other occasion if so required, on which they are bound to produce such rate books: Act of 1869, s. 68.

The duplicate of the valuation list returned to the Assessment Committee by the clerk of the London County Council is to be kept at the board room or other convenient place appointed by the London County Council, but shall be deemed to be in the possession of the Assessment Committee and shall be produced by their clerk to the district auditor whenever required by him: Act of 1869, s. 68; Local Government Act, 1929, Sch. 10.

It follows from the foregoing provisions that the authentic valuation list is that copy which remains in the possession of the Assessment Committee, and not that which remains in the possession of the rating authority. If alterations are to be made in the valuation list they are to be made by the Assessment Committee, or, in the case of an appeal to Quarter Sessions, by the chairman. Only when the rating authority gets notice of an alteration duly made by the Assessment Committee or by the justices has that authority power to alter the valuation list. It follows that the mandamus commands the appellants to do an act which they have no power to do, and which, if done, would not benefit the respondents but could only create confusion; for if the appellants should obey the mandamus and insert the hereditaments in Part II. of the Quinquennial Valuation List, 1930, there is no provision obliging the Assessment Committee to make a corresponding alteration in the duplicate of the list in their possession, and the greatest confusion will result, because if the hereditaments appear in Part II. they are to be rated at one fourth instead of the whole of their rateable value; the total rateable value of the rating area will thus be lowered, but the London County Council will act on the totals of the gross and rateable values as they appear in the copy of the valuation list in the possession of the Assessment Committee, and there is no way of getting these totals reduced.

Secondly, the Court will be slow to apply the remedy of mandamus where the Legislature has provided a special means of redressing the grievance complained of: *Rex* v. *City of London Assessment Committee*. (1) The respondents could

(1) [1907] 2 K. B. 764.

have appealed to Quarter Sessions from the decision of the Assessment Committee removing the hereditaments from Part II. and inserting them in Part I. of the Quinquennial Valuation List, 1930. They did not do this. If they had done so and failed before the Assessment Committee, they might have appealed to Quarter Sessions, and from the decision of the Sessions, if adverse, to the High Court, from thence to the Court of Appeal, and finally to this House. If they had succeeded in establishing their contention, the valuation list would have been altered by the Assessment Committee and the appellants would have been duly notified of the alteration, and both copies of the valuation list would have been made to correspond. This is the elaborate scheme prescribed by the Legislature for ensuring that the valuation list shall be accurate and final. The Court will not permit an aggrieved ratepayer to ignore the scheme and attain his object by a method of his own choosing.

Furthermore, it is provided by s. 70, sub-s. 4, of the Local Government Act, 1929, that notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928, no hereditament shall, for the purposes of any valuation list which will come into force after the appointed day—October 1, 1929: see s. 134—be treated as an agricultural, industrial or freight transport hereditament unless it was so treated for the purposes of the last preceding valuation list except upon a claim that it ought to be so treated being made to the rating authority by the owner or occupier of the hereditament in the prescribed form, which shall be supplied by the rating authority on the demand of the owner or occupier of any hereditament in their area. No such demand has been made by the respondents or any other owner or occupier and no claim in the prescribed form has been made to the appellants.

Feb. 1. *Sir William Jowitt K.C.*, *Maurice Healy K.C.* and *Reginald T. Sharpe* for the respondents. By s. 1 of the Rating and Valuation (Apportionment) Act, 1928, "In every valuation list the classes of hereditaments" thereinafter mentioned "shall . . . . be distinguished from each other and from all other hereditaments, that is to say there shall be so distinguished," among others, " industrial hereditaments."

By s. 4, sub-s. 1, " In every valuation list every industrial hereditament occupied and used wholly for industrial purposes shall be shown as being so occupied and used " . . . . The manner in which industrial hereditaments are to be distinguished is prescribed by the London (Valuation Lists) Rules, 1929. By rule 2 a valuation list prepared by a rating authority under s. 46 of the Act of 1869 shall be in the form A set out in the schedule hereto." Form A consists of two parts. Part I. contains hereditaments other than industrial and freight transport hereditaments. Part II. is devoted to industrial hereditaments. Therefore when the appellants were making out the new Valuation List to come into force on April 6, 1931, these hereditaments ought to have been inserted in Part II. of the list as industrial hereditaments; the appellants are the authority by whom this act should have been done; the act was not done, and the respondents have to pay four times the proper amount in rates of their premises. Here is a prima facie case for a mandamus commanding the appellants now to insert these premises in Part II. The Court has power by the prerogative writ of mandamus " to amend all extrajudicial errors which tend to the breach of the peace, oppression of the subject, or other misgovernance," and this power " ought to be used on all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. It is granted to prevent failure of justice and for the execution of the common law or of a statute " : Com. Dig. Mandamus A. The fact that the time for making and depositing the Valuation List has passed is immaterial. A mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed; and if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and been succeeded by another person, the writ may be directed to the successor, and it is his duty to obey it; and where there is no successor,

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but the person who ought to have performed the duty has become functus officio, the latter may be ordered to perform it, though the time within which he could of his own motion have performed it has past: per Channell J.: *Rex* v. *The Revising Barrister for the Borough of Hanley* (1), following the judgment of the majority of the Court of Exchequer Chamber: *Mayor of Rochester* v. *The King*. (2)

It is said that at the time when the appellants were making out the Valuation List there was in force the decision of Quarter Sessions that the hereditaments were not industrial hereditaments, and that the appellants were not guilty of any breach of duty in putting them in Part I. in accordance with that decision, but would have been guilty of a breach of duty in doing otherwise, But that argument rests on the false assumption that the Court will only grant a mandamus to correct a breach of duty. No doubt it will grant a mandamus for that purpose, and a breach of duty by a public officer is perhaps the most frequent occasion for the issue of the writ. But it is a great mistake to suppose that it is the only occasion; the jurisdiction of the Court is bound by no such restrictions. In *Rex* v. *The Archbishop of Canterbury* (3) Lord Ellenborough said that the Court would render the writ of mandamus "the supplementary means of substantial justice in every case where there is no other specific legal remedy for a legal right."

But even if the appellants were within their rights when they made the valuation list they are actually in breach of duty now in having omitted from Part II. premises which are industrial hereditaments and which must now be taken to have been industrial hereditaments at the time when the valuation list was being prepared. The decision of the Divisional Court on April 23, 1931, declared the nature of these hereditaments and pronounced them to be and to have been at all material times industrial hereditaments. This was an adjudication in the nature of a judgment in rem declaring the character of these premises. By the Supreme Court of

(1) [1912] 3 K. B. 518, 531. (2) (1858) E. B. & E. 1024.
(3) (1812) 15 East, 117, 136.

Judicature (Consolidation) Act, 1925, s. 25, sub-s. 4, an appeal from a Court of Quarter Sessions " shall unless the appellate Court otherwise directs have effect as if the judgment had been given . . . . by the court of quarter sessions at the time of the decision in respect of which the appeal from quarter sessions was brought " . . . . It follows that on December 11, 1929, the day on which the Court of Quarter Sessions decided that for the purposes of the Special List the hereditaments were not industrial hereditaments these hereditaments in fact and in law were industrial hereditaments. So they have since remained and the appellants are now in breach of their statutory duty in refusing to insert the hereditaments in Part II. It is no doubt a valid objection to the issue of a mandamus that there is open to the prosecutor another and a convenient remedy ; but in the present case no such remedy was available for the respondents. If they had appealed to Quarter Sessions they could not have succeeded, because there was in existence the former decision of that Court excluding the same hereditaments from the Special List.

Feb. 2. *Wilfrid Greene K.C.* replied.

The House took time for consideration.

March 6. LORD TOMLIN. My Lords, I have had the advantage of considering the opinion which is about to be read by my noble and learned friend Lord Wright. In the reasoning and conclusions of that opinion I concur. As, however, a different view was taken in the Court of Appeal, I desire to say that the conclusions in question do not in my opinion in any way involve or imply the restriction of the recognized scope of the prerogative writ of mandamus.

The position of the appellants in this case was at the material time such as in my view to make it impossible to say that under the relevant Acts there was default on their part in performance of any public duty.

It is I think plain that at the time when the appellants settled the Quinquennial Valuation List, 1930, it was not their duty to put the respondents' hereditaments into Part II. of that list. On the contrary as matters then stood it was their duty not to do so. The hereditaments were not in the Special List, and no application had been made to the appellants by the respondents to place the hereditaments in Part II. of the Quinquennial Valuation List.

The subsequent decision of the High Court related not to the form of the Quinquennial Valuation List but to the form of the Special List. The considerations which respectively governed the compilation of the two lists were not necessarily the same, and in any case if at the date when the Quinquennial Valuation List was settled it was the duty of the appellants to place the hereditaments in Part I. of that list, the subsequent decision of the High Court upon the Special List could not in my opinion ex post facto convert an act which when done was in strict compliance with the statutory duty of the appellants into a default remediable by writ of mandamus.

I think therefore that the appeal should be allowed.

LORD WARRINGTON OF CLYFFE (read by LORD TOMLIN). My Lords, the appellants are the rating authority of the Borough of Stepney. The respondents are the occupiers of four hereditaments within that rating area. It is now no longer in dispute that the four hereditaments in question are in fact "industrial hereditaments," and would properly have been included as such in Part II. of the Quinquennial Valuation List, 1930, had the respondents taken the proper steps to obtain a revision of the list. Under the circumstances hereinafter referred to, however, they appeared in Part I. of the List as deposited by the appellants after it had been finally approved by the Assessment Committee of the rating area. The order of the Court of Appeal (Lord Hanworth M.R. and Slesser and Romer L.JJ.), from which the present appeal is brought, was dated November 29, 1932, and by it the Court (reversing an order of the King's Bench Division dated July 22, 1932) ordered that a writ of mandamus should issue directed to the appellants as the rating authority for the parish of Stepney commanding them to insert the four hereditaments in question in Part II. of the Quinquennial Valuation List, 1930, or such list as was then in force.

Two main questions arise for decision: (I.) Whether under the circumstances of the present case the appellants were either (1.) at the time when they made and deposited the Quinquennial Valuation List for 1930, or (2.) at any material time thereafter, under a duty enforceable by a writ of mandamus to insert the hereditaments in question in Part II. of the List, and (II.) Whether the neglect of the respondents to avail themselves of the specific modes of relief provided by the Valuation (Metropolis) Act, 1869, disentitled them from obtaining the writ of mandamus above mentioned.

My Lords, the circumstances of the case and the modes of relief provided by the above mentioned Act have been so fully stated and explained by my noble and learned friend Lord Wright, whose opinion I have read, that I might simply express my concurrence in his conclusions and say no more; but I propose, out of deference to the members of the Court of Appeal, whose order we are reversing, to state quite shortly my reasons for answering both the above questions in favour of the appellants.

As to question (I.). By s. 70, sub-s. 4, of the Local Government Act, 1929, it is provided that notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928, no hereditament shall, for the purpose of any valuation list which will come into force after the appointed day—which for this purpose was October 1, 1929—be treated as an industrial hereditament unless it was so treated for the purpose of the last preceding valuation list, except upon a claim that it ought to be so treated being made to the rating authority by the owner or occupier in the prescribed form. At the time the Quinquennial List was settled by the Assessment Committee and the appellants, the hereditaments in question did not appear as industrial hereditaments in the "last preceding valuation," whether this be treated as the Special List under the Act of 1928 or the last Quinquennial Valuation List, and it was therefore the duty of the appellants not to treat the hereditaments as industrial hereditaments

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except upon a claim made by the respondents, and no such claim was made. I have some doubt whether, having regard to the opening words of the sub-section, the special valuation for the purposes of the Act of 1928 can be regarded as the last preceding valuation, but even if it can be so regarded the hereditaments in question were not at the material date treated as industrial hereditaments for the purposes of that valuation; the order of the Court of Quarter Sessions excluding them from that category was then in force not having been set aside by the subsequent order of the King's Bench Division. I cannot bring myself to understand how the last mentioned order can have such a retroactive force as to turn into a breach of duty by the rating authority conduct which up to that time had been in strict accordance with it. In my opinion therefore, question (I.) should be answered in the appellants' favour.

As to question (II.). In the Act of 1869 a complete and easily understood code is laid down for the purpose of enabling objections, either by a ratepayer or other specified persons, to acts of the Assessment Committee or the rating authority to be considered and dealt with either by those bodies themselves or, in case of necessity, by judicial authority. In the present case all necessary notices were given so that the respondents were at all times in a position effectually to obtain relief under the statutory provisions. It is difficult to understand why the respondents deliberately, as it is said, abstained from resorting to the statutory provisions. They say they did so because until the decision of Quarter Sessions in reference to the Special List under the Act of 1928 had been set aside, an appeal in respect of the Quinquennial List would probably have failed. But, assuming that to be so, it can afford no excuse for having abstained from taking steps which would at least have kept their claims alive. In fact it was not until April, 1932, long after the Quinquennial List had come into force, that they raised their present claim.

In my opinion this is one of those cases in which the Legislature has provided suitable means whereby persons aggrieved by the action of the rating authorities can obtain the removal of that grievance, and I am of opinion that when that is so it must be inferred that those means are intended to be exclusive: see *Rex* v. *City of London Assessment Committee.* (1) On this point I agree with Romer L.J. We were told that it is hard that for the rest of the Quinquennial period the respondents will be deprived of the benefits of the Acts of 1928 and 1929. The answer is that any hardship is the result of their own failure to avail themselves of the procedure open to them under the statute.

In my opinion this appeal succeeds. The order of the Court of Appeal should be discharged and that of the King's Bench Division restored and the respondents should be ordered to pay the appellants' costs here and below.

LORD RUSSELL OF KILLOWEN. My Lords, having had the advantage of reading beforehand the detailed opinion on this appeal which will be delivered by my noble and learned friend Lord Wright and with which I agree, I can state more briefly the features of this case which lead me to the conclusion that a writ of mandamus ought not to issue.

In order to justify the issue of the writ, it is in my opinion essential to establish that the Borough Council was in the year 1930 guilty of a breach of duty; in other words that when, as directed under or by virtue of s. 6 of the Valuation (Metropolis) Act, 1869, they made and signed in duplicate the Quinquennial Valuation List, 1930, they were under a duty to include the four hereditaments here in question in Part II. of that List. If a date must be assigned to a breach of that duty, it would I imagine be August 2, 1930, when the list was deposited by the Borough Council under or in pursuance of s. 17 of the Union Assessment Committee Act, 1862. I do not forget that for some unexplained reason one of the hereditaments was originally inserted in Part II., but was subsequently transferred to Part I. by the Assessment Committee. That is a detail which, in forming a judgment on this appeal, may I think be disregarded.

At the relevant date (August 2, 1930) the state of affairs was this: The four hereditaments had by order of Quarter Sessions (dated December 11, 1929) been struck out of the Special List, with the result that they were not in August, 1930, treated as industrial hereditaments in the valuation list immediately preceding the Quinquennial Valuation List, 1930.

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(1) [1907] 2 K. B. 764.

If the respondents desired to have the four hereditaments all included in Part II. of this last mentioned list, they had every means so to do provided under the statutes. They could have made a claim for their inclusion, they could have applied to the Assessment Committee, and could have appealed from them to Quarter Sessions, and from Quarter Sessions by special case to the King's Bench Division. They took no such step. Why, I do not know; but their conduct in this respect is the more strange when one realizes that a special case in relation to the Special List decision was already in contemplation. It was in fact stated on March 6, 1931. The Quinquennial Valuation List, 1930, with the four hereditaments in Part I., was finally approved by the Assessment Committee on March 19, 1931; was deposited by the Borough Council on March 21, 1931, and came into force on April 6, 1931.

Later, in the same month, the King's Bench Division heard arguments on the special case in relation to the Special List decision, and held that all four hereditaments should be included in the Special List: and they were so included accordingly. The respondents then asserted that after the judgment of the King's Bench Division it became the duty of the Borough Council to alter the Quinquennial Valuation List, 1930, and put the hereditaments into Part II. thereof. In April, 1932, they made a formal request in that behalf to the Borough Council, with which the Borough Council refused to comply.

My Lords, I cannot see how any such duty can then have arisen in the Borough Council. Their powers under the Acts in relation to that list had long before come to an end; indeed, so far as the frame and contents of a valuation list are concerned, the only power which the Borough Council can exercise on their own initiative is the power to "make and sign a valuation list . . . . in duplicate." That starts the ball rolling; but the list is in the nature of a draft list, which has to be revised and finally settled (subject to appeal) not by the Borough Council but by the Assessment Committee. When finally settled by the Assessment Committee there is no power in the Borough Council to make any alteration therein, except (see s. 41 of the Act of 1869) as a consequence of an appeal to Sessions or a superior Court. There was therefore no power in the Borough Council in April, 1932, to alter the Quinquennial Valuation List, 1930.

The Court of Appeal in ordering a mandamus to issue have, as I read their judgments, proceeded upon a different footing. They argued thus: That under s. 25, sub-s. 4, of the Supreme Court of Judicature (Consolidation) Act, 1925, the order of the King's Bench Division operated nunc pro tunc, that therefore the hereditaments must be deemed to have been in August, 1930, in the Special List, that therefore it must be deemed to have been the Borough Council's duty in August, 1930, to include them in Part II. of the new Valuation List which they were then preparing, and that therefore since in August, 1930, they had failed in the performance of this public duty, a mandamus might properly issue to compel them now to perform it.

This appears to me a highly artificial argument, and one open to grave objection. It is plain that as matters in fact stood in August, 1930, so far from there being then any duty on the Borough Council to include the hereditaments in Part II. of the new Valuation List, s. 70, sub-s. 4, of the Local Government Act, 1929, expressly prohibited their inclusion, except upon claim being made, and no claim was made. But even if the hereditaments had been in the Special List, the duty of the Borough Council would not necessarily be to include them in Part II. of the new list. Their duty would be to consider all the relevant facts as they then existed with a view to determining whether Part II. was their proper location, and if so whether any and what apportionment in respect of purposes should be made. Further, if the Borough

Council now insert these hereditaments in Part II. of the new list upon the footing that they should have done so in August, 1930, the position will be now by no means the same as it would have been if the insertion had in fact been made in August, 1930. The Borough Council are being ordered to put the hereditaments into Part II. of a List which has been finally settled beyond appeal, whereas the supposed duty which they are being compelled by mandamus to fulfil was at its highest only a duty to put the hereditaments into Part II. of what I have described as a draft list, which another body had to revise and finally settle, and which, before it became finally binding, was capable of being altered in regard to these same hereditaments, as the result of appeals at the instance of various persons and authorities. The effect of the order of the Court of Appeal is to destroy all these rights of appeal.

In truth the nunc pro tunc theory has been stretched to breaking point in the present case. I can understand that it can apply and will apply so as to render these hereditaments entitled to relief from rates as from October 1, 1929; but I do not understand how it can apply so as to create retroactively a duty which did not in fact or in law exist at the relevant date. Still less do I understand how upon the nunc pro tunc theory an order of the Divisional Court, which was made in regard to the Special List, can create retroactively a duty in relation to the Quinquennial Valuation List, 1930.

In my opinion it is not possible to say that the Borough Council failed at any time to discharge any public duty, and accordingly the essential foundation for mandamus is lacking.

I would add that I am also of opinion that there was available here a complete and convenient remedy, the existence of which would be sufficient ground for refusing mandamus.

It is said that this is a hard case on the respondents; but for the hardship they have only themselves to blame. I am not prepared, in order to avoid hardship, to strain the law, and order the issue of a writ of mandamus which is not based upon any failure to discharge a public duty, and which if

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granted would throw sand into the rating machinery which the statutes have provided. I would allow this appeal.

LORD MACMILLAN (read by LORD RUSSELL OF KILLOWEN). My Lords, when the appellants addressed themselves in 1930 to the preparation of the Quinquennial Valuation List of the hereditaments in their borough they had before them a peremptory direction that no hereditament should for the purposes of that list be treated as an industrial hereditament unless it was so treated for the purposes of the last preceding valuation list, except upon a claim that it ought to be so treated being made to them by the owner or occupier of the hereditament (Local Government Act, 1929, s. 70, sub-s. 4). This direction is expressly stated to be "notwithstanding anything in the Rating and Valuation (Apportionment) Act, 1928"; it therefore qualifies and overrides the general enactment in s. 4, sub-s. 1, of that Act as to the manner in which industrial hereditaments are to be shown in every valuation list.

The last preceding valuation list was the list in force on October 1, 1929, as brought into conformity with the Rating and Valuation (Apportionment) Act, 1928, by means of the Special List prepared in accordance with the provisions contained in the First Schedule to that Act. The 8th paragraph of the Schedule directs that the Special List so to be prepared shall be deemed to form part of the valuation list.

On reference to the last preceding valuation list (which thus included the Special List), as it then stood in conformity with the decision of Quarter Sessions on December 11, 1929, the appellants found that the respondents' hereditaments were not treated therein as industrial hereditaments for the purposes of that list and they had not before them any claim by the respondents that their hereditaments should be so treated in the new list. Their duty accordingly was not to enter the respondents' hereditaments as industrial hereditaments in the Quinquennial Valuation List, 1930. For some unexplained reason they did enter one of the respondents' hereditaments as an industrial hereditament, but this was altered by the Assessment Committee, and the Quinquennial Valuation List, 1930, as it was finally completed and came into force on April 6, 1931, showed none of the respondents' hereditaments as industrial hereditaments. The list was compiled in every respect in accordance with the prescribed statutory procedure. Nevertheless by the order appealed from a writ of mandamus has been directed to issue to the appellants commanding them now to enter the respondents' hereditaments as industrial hereditaments in the Quinquennial Valuation List, 1930.

My Lords, with all respect to the learned judges of the Court of Appeal, I can see no justification for the order which they have pronounced. It is explained, but not in my opinion justified, by the following circumstances. It appears that while the appellants were performing their statutory duty of preparing the Quinquennial Valuation List, the decision of Quarter Sessions of December 11, 1929, with regard to the treatment of the respondents' hereditaments in the Special List (i.e., in the last preceding valuation list) was in process of being brought under review by the King's Bench Division in a stated case, and on April 23, 1931, after the Quinquennial Valuation List, 1930, had come into force, the Divisional Court held that the respondents' hereditaments were industrial hereditaments for the purposes of the Special List and fell to be entered as such in the Special List (i.e., in the last preceding list). The argument then invokes s. 25, sub-s. 4, of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that a judgment on appeal from Quarter Sessions shall have effect as if the judgment had been given by the Court of Quarter Sessions at the time of the decision in respect of which the appeal was brought. Therefore, it is said, it must be held to have been the duty, or at least now to be the duty, of the appellants to enter the hereditaments in question in the Quinquennial Valuation List, 1930, as industrial hereditaments because they are now so entered in the last preceding valuation list, although they were not so entered at the time when the appellants performed their duty of compiling the Quinquennial Valuation List, 1930.

My Lords, this is in my view an untenable argument. The Act of 1925 no doubt has the effect of requiring the correction of the preceding valuation list to be treated as relating back to the date of the erroneous decision of Quarter Sessions—namely, December 11, 1929, but it cannot have the effect of altering ex post facto the statutory duty imposed upon the appellants with regard to the preparation of the Quinquennial Valuation List, 1930. The appellants had to perform that duty when it arose and as matters then stood; the nature of that duty cannot now be altered after the event. I do not see how a decision subsequently obtained with regard to the last preceding valuation list can justify the issuing of a mandamus to the appellants to alter another and different valuation list—namely, the Quinquennial Valuation List, 1930, which has been compiled as the statute requires and has now become final. The hands of the clock cannot be put back in this fashion. The confusion which would result from attempting thus to interfere with the elaborate mechanism of the statutory procedure is obvious, and has been described to your Lordships by Mr. Greene in sufficiently deterrent terms. Even if the respondents' hereditaments had originally been entered as industrial in the last preceding valuation list, it does not necessarily follow that they must have been entered as such in the Quinquennial Valuation List, 1930. There might meantime have been alterations in the user of the premises. Sect. 70, sub-s. 4, of the Local Government Act, 1929, is expressed negatively, not positively; it does not require all hereditaments which were treated as industrial in the last preceding valuation list to be so treated in the new list. It was open to the respondents to take steps to have their hereditaments entered as industrial in the Quinquennial Valuation List, 1930, but they did not do so.

My Lords, there is here no case of a public legal duty which the appellants have failed to perform and which they ought now to be ordered to perform. They performed their duty as the statute required them to do; they cannot now be ordered to retrace their steps and perform it in a different way. The benefit of derating is a purely statutory benefit and those who desire to enjoy the privilege must comply with the statutory requirements. The respondents have lost that benefit by their own neglect of the means provided for securing it, and it is not for the Courts to rescue them from the consequences. I accordingly concur with your Lordships in the motion that the appeal be allowed with costs.

Lord Wright. My Lords, the appellants are the rating authority of the Borough of Stepney: the respondents are the owners and occupiers of four hereditaments within that rating area. This appeal is from an order of the Court of Appeal made on November 29, 1932, that a writ of mandamus should issue directed to the appellants as the rating authority of the parish of Stepney commanding them to insert the four hereditaments in question in Part II. of the Quinquennial Valuation List, 1930, or such list as was then in force. In the Valuation List as deposited by the appellants after it had been finally approved by the Assessment Committee of the assessment area, the hereditaments had been inserted in Part I. (that is as premises which, as not being industrial premises, were not entitled to the benefit of the reduction in rateable value under s. 68 of the Local Government Act, 1929, hereinafter called the Act of 1929): the respondents had made no objection either before the appellants or the Assessment Committee of the area within the times required by the Acts, to which I shall refer, or at all. It was not until April 11, 1932, that the respondents requested the appellants to insert the hereditaments, as being industrial hereditaments, in Part II. of the Valuation List; when the appellants refused to do so, the respondents applied for, and were granted, a rule nisi calling upon the appellants to show cause why a writ of mandamus should not issue commanding them to do so. A Divisional Court before which the matter came, held that the appellants had no power to comply with the respondents' request, and ordered the rule to be discharged. That order was reversed as above stated by the Court of Appeal, and instead thereof the order set out above was made.

For purposes of the appeal it is essential to ascertain the functions which by law are performed by the appellants in the preparation and deposit of valuation lists: I shall accordingly seek first to summarize the relevant statutory provisions, the full terms of which have been duly brought to your Lordships' notice. But before turning to matters of procedure, I may refer briefly to the legislation which makes it matter of substance whether the hereditaments appear in Part I. or Part II. of the Valuation Lists. By s. 68 of the Act of 1929, the rateable value of premises occupied and used wholly as industrial premises (I disregard other privileged categories) was to be taken to be one quarter of the net annual value, while in the case of premises occupied and used partly as industrial premises, an apportionment was to be made of the net annual value as between the part of the premises used for industrial purposes and the part not so used, and the rateable value of the part so used for industrial purposes was to be one quarter of the net annual value, apportioned to that part, whereas in regard to the part used for other purposes, there was to be no such abatement. In order to give effect to this scheme, when put in force, the Rating and Valuation (Apportionment) Act, 1928, hereinafter called the Act of 1928, and the Rules made under or by virtue of it, provided that in the preparation of valuation lists in London there should be inserted in Part I. hereditaments other than industrial hereditaments (I throughout herein disregard freight transport hereditaments) while in Part II. should be inserted industrial hereditaments, with columns for gross value and net annual value, and that in appropriate cases there should be an apportionment of net annual value so as to ascertain the rateable value. The benefits under these Acts came into force on October 1, 1929, though the next ensuing Quinquennial Valuation List did not become effective until April 6, 1931: to bridge that interval of time and make the benefits available before the expiry of the current Valuation List, a Special Valuation List was to be prepared in conformity with the Acts, showing (inter alia) what were industrial hereditaments, with any apportionment which was required by the nature of the occupation and user where it was only in part for industrial purposes. This Special Valuation List was to be in force until in due course the Quinquennial Valuation List, 1930, was prepared and put in force. The procedure in the preparation of the Valuation Lists was to be regulated by the Valuation (Metropolis) Act, 1869, as amended by the subsequent Acts.

I shall attempt to state in outline the statutory procedure for the preparation of the Quinquennial Valuation, 1930, as laid down by these Acts and Rules. The appellants as the rating authority now hold the place formerly held by the Overseers: their duty is to make and sign a valuation list of their rating area in duplicate, but before proceeding to prepare this list they are to give notices requiring occupiers to make returns of rent or annual value. They are to send one duplicate, when made, to the Surveyor of Taxes (1), who is to transmit it with his suggested alterations to the Assessment Committee within 28 days after he has received it: the other duplicate is deposited by the rating authority, who are required to give public notice of the deposit, stating the times at which and the mode in which objections are to be made: they also have immediately after the deposit to give notice to any occupier of a hereditament not previously assessed if that hereditament is inserted, or to the occupier of any hereditament already in the list if any increase has been made in its gross or rateable value. The rating authority must transmit the list to the Assessment Committee not sooner than 14 and not later than 17 days after notice is given of deposit. Before the Assessment Committee a right of objection is given to persons who feel aggrieved by reason of the unfairness or incorrectness of the valuation of any hereditament, or by reason of the insertion or incorrectness of any matter in the valuation list, or by reason of the omission of any matter therefrom: this would, in my judgment, include the case of an occupier complaining that his premises have been

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(1) Since April 6, 1932, it has ceased to be the duty of the rating authority to send a duplicate to the Surveyor of Taxes: see the Finance Act, 1930 (20 & 21 Geo. 5, c. 28), s. 53, sub-s. 8, and the Third Schedule to that Act, Part III.

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inserted in Part I. instead of Part II. Notice of objection must be given by a ratepayer or any person other than the Surveyor of Taxes (1) or the rating authority before the expiration of 25 days after the list is deposited. For the purpose of hearing objections, the Assessment Committee must on due notice hold a meeting which may be adjourned: but the Committee has in general a wide power of making such alterations in the valuations or in regard to the placing of hereditaments as they may think fit, and finally must approve the list under the hands of three members of the Committee; but if they make alterations they must send the valuation list to the rating authority to be redeposited and must appoint a day for the hearing of objections of which meeting seven days' notice must be given to the objectors; the rating authority must serve notice on any occupier affected by any such alteration. After all such objections have been heard, the Committee are required to settle finally the Valuation List and to cause the totals of the gross and rateable values on that list to be ascertained and inserted therein. One duplicate of the list so finally settled is deposited by the rating authority in the place in which the rate books of the parish are kept; notice must be given of such deposit so that any one desiring to appeal may do so. The other duplicate is kept eventually by the Assessment Committee. The totals of the gross and rateable values of all the valuation lists have to be circulated by the London County Council among the various authorities interested. The only appeal which for present purposes may be noted is that to the Assessment Sessions, now to London Quarter Sessions. This right of appeal was given to any ratepayer or any Surveyor of Taxes (1) and any Overseer who may feel aggrieved by any decision of the Assessment Committee on any objection made by him. The right of appeal is also given to Assessment Committees in the Metropolis or in the County in which is the parish and to other similar bodies. This wide right is given because the decision in regard to any particular hereditament may change the totals by which the various other

(1) See note on page 390, ante.

interested parties are affected. Provision is made for the alteration of the Valuation Lists not only by Quarter Sessions but also by the rating authority and by the Assessment Committee on their respective duplicates, in order to give effect to any decision on appeal by Quarter Sessions or by the High Court on certiorari or on a case stated. There is provision not here material for supplemental or provisional lists, and power is given to the Assessment Committee to correct clerical and arithmetical errors but subject to due notices to persons affected; apart from these exceptions there is no other provision for altering the Valuation Lists during the Quinquennial period: the lists are accordingly in effect conclusive, when finally settled, subject to the decision of pending appeals.

I have summarized these provisions so far as relevant in order to show that the Legislature has carefully provided a machinery to ensure that the fullest opportunity is given to any person affected to make objection and to appeal; it is only after such opportunities have been afforded that the Valuation List is conclusive: the only provision made for alteration in consequence of any decision of the High Court is when it is the result of the hearing of a special case or on certiorari. It is of first importance that the list once finally settled should be conclusive, because of the number of persons and bodies whose position is affected by any particular change. No room is then left for interference by mandamus.

I have omitted one provision peculiarly relevant in this case: By s. 70, sub-s. 4, of the Local Government Act, 1929, it is provided that no hereditament is to be treated as (inter alia) an industrial hereditament, unless it was so treated for the purposes in the last preceding valuation list, except on a claim duly made to the rating authority by the owner or occupier.

I may now turn to the facts of this particular case as affecting the respondents in regard to the preparation of the Quinquennial Valuation List, 1930. It is clear that at each stage all proper notices were given to the respondents to object or to appeal: it is clear that in all respects the rating authority and the Assessment Committee complied with all requirements of the Acts: it is equally clear that at no material time did the respondents either object or appeal. The appellants as rating authority deposited the list on August 2, 1930, and gave the respondents notice that one of the four hereditaments was inserted in Part II., an irregularity which I can disregard, and the other three in Part I.: the respondents took no action. On December 30, 1930, the Assessment Committee altered the list by transferring from Part II. to Part I. the one hereditament which the rating authority had put in Part II. On the same day the Committee redeposited the list and gave the respondent notice of the one hereditament which had been transferred to Part I. The respondents took no action and on March 21, 1931, the Quinquennial Valuation List, 1930, was deposited by the appellants as finally approved. It was not till April 11, 1932, that the respondents made a formal request to the appellants to alter the list by inserting the four hereditaments in Part II.: the appellants felt themselves incompetent to comply with this request and refused to make the alteration.

It may be that the explanation of this inertness on the part of the respondents is to be found in the proceedings in regard to the position of the four hereditaments in the Special List. These proceedings, which were separate from the preparation of the list for 1930, had ended on July 1, 1931, when all four hereditaments had been placed in the Special List, under an order of Quarter Sessions giving effect to a decision of the Court of King's Bench dated April 23, 1931. What had happened had been that in preparing the draft Special List the Assessment Committee had placed all four hereditaments in it, but Quarter Sessions on an appeal by the Surveyor of Taxes had on December 11, 1929, held, subject to a special case, that they were not properly placed in the Special List. Hence at the time when the Assessment Committee were revising the list for 1930, the hereditaments in question were not in the Special List, and as no claim was made to the rating authority to place them in Part II., the provision quoted above rendered it incompetent to treat the hereditaments as coming within the description of industrial hereditaments; and in any case the respondents did not avail themselves of any of the powers of objecting or of appealing given by the statutes referred to above. It is said that they did not do so because to do so would have been useless as long as the adverse decision of Quarter Sessions stood. In the sense that no final result could then be achieved, that may be true; but the obviously proper course for the respondents to take was to object in due course and if necessary appeal to Quarter Sessions and again if necessary request a special case to be stated for the decision of the High Court, in the same way as had been done in the proceedings in the matter of the Special List. There can be no practical doubt that if this course had been taken, Quarter Sessions would have kept their decision open on the Valuation List for 1930, pending the decision in regard to the Special List. The principles involved in regard to both lists were the same, though it must not be forgotten that the issue on the Special List was in law and in fact different from that in respect of the 1930 list, because the relevant date for valuation in either case was different, and even if no change in the user of the hereditaments had taken place, there were different questions to be determined of values or apportionment. In my opinion the respondents completely failed to avail themselves of the rights of objecting or appealing given to them by the statutes in regard to any complaint: can they in these proceedings invoke the intervention of the Court by way of mandamus?

The Court of Appeal have held that they can: their view, as I understand it, in substance, is that injustice has been done because the hereditaments are admittedly industrial hereditaments and hence under ss. 1 and 4 of the Act of 1928 there is an imperative and peremptory duty on the rating authority to place them in Part II.: they hold that the various statutory powers of objecting and appealing which were open to the respondents, but which they neglected at the proper time, did not constitute so convenient, beneficial or effectual a remedy as the writ of mandamus, which accordingly should in their judgment be ordered to issue. This, I think, is the substantial basis of their decision: there are subsidiary reasons which I shall discuss later.

I do not wish in any way to detract from the seriousness of the duties with which the Court is charged in dealing with an application for a writ of mandamus, or the importance of the Court giving the most liberal consideration in the interests of the applicant. In the words of Lord Mansfield in *Rex* v. *Barker* (1), "A mandamus is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice." More compendiously it was said by Bowen L.J. in *In re Nathan* (2) "If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done." Thus the judges have a wide discretion in exercising this remedial jurisdiction; but it is to be exercised as a judicial discretion. There are in the books a vast number of cases illustrating the rules which govern the exercise of this power. Some of these cases are difficult to reconcile with others. I shall merely seek by a few citations to justify the principles which I think should govern this case.

The essence of the respondents' claim is that they have a right to have their hereditaments put into Part II. of the List; but that right can only be based, if it exists at all, on the statutes I have summarized. In *Doe* v. *Bridges* (3) Lord Tenterden uses language quoted with approval by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (4) to this effect: "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." In the present case the right of the respondents to have their hereditaments placed in Part II. can only arise under the various Acts, and these also define the corresponding obligations on the part of the rating authorities. The Acts in my opinion have comprehensively and exclusively provided machinery for their enforcement. This I regard as the fundamental matter for the determination of this case, though I shall later discuss other contentions put forward. The decision of the Court of Appeal in *Rex* v. *City of London Assessment Committee* (1) was considered by the Court of Appeal in the present case and was either distinguished or doubted. In my opinion that case is directly in point on the main principle to be here applied and is correctly decided; on other matters in that case not here material, I express no opinion, though I must not be taken to disapprove. That case turned on the Metropolis (Valuation) Act, 1869; the Assessment Committee had failed to perform their statutory duty to insert the rateable value of certain premises in the valuation list: the Corporation of London neglected to appeal (which it seems as rating authority they were entitled to do) but later applied for a writ of mandamus: the Court of Appeal discharged the Rule: I desire to repeat the language of Fletcher Moulton L.J., dealing with the machinery for the preparation of valuation lists under the Act of 1869, because I think it directly relevant here and most justly expressed: he says: (2) " The Legislature has drawn up a code of procedure, which was intended to be a practical code, for ensuring the substantial accuracy of a valuation list. The preparation of the list is hedged round by various safeguards, which allow persons directly and primarily interested to be heard during the period of its preparation; and when the Legislature has decided what are proper safeguards sufficient to ensure in practice a proper valuation list, it is not for us to add new safeguards. Even if I were satisfied that the Legislature did not intend the rating authority to have the wide powers of interference which I think it has given to it, I should feel bound to hold that it refused to do so because it thought it had given adequate protection in the formation of the list." A little earlier in his judgment he said; (1) "The rating authority, having neglected to avail itself of that procedure," (sc. that provided by the Act) "cannot apply for a mandamus to the assessment committee to correct its valuation list; its proper course was to enforce the correction . . . . of that list by means of the procedure provided by the statute." The circumstances of that case were in certain respects different from those of this case, but I take that quotation as a general statement of principle which should be applied here. The Legislature no doubt provided for alterations and consequent adjustments rendered necessary by decisions of the High Court as the final result of objections duly taken: it no doubt chose to adopt that course rather than have the preparation of the list as a whole held up pending inevitable legal delays; but it would be a very different matter if the Court were to order an independent alteration outside any statutory machinery.

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(1) (1762) 3 Burr. 1265, 1267.
(2) (1884) 12 Q. B. D. 461, 478.
(3) (1831) 1 B. & Ad. 847.
(4) [1898] A. C. 387, 394.

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(1) [1907] 2 K. B. 764.

(2) Ibid. 794.

I think this reasoning is conclusive against the respondents' claim here. But I think it necessary to consider some further contentions which have been advanced and discussed.

It is axiomatic that the foundation for the application of a writ of mandamus is the failure to perform some public duty; but in the present case I cannot find on the facts I have stated any failure of duty on the part of the appellants. It is said in general terms that they have failed in an absolute duty to place these hereditaments in Part II.; that duty however is not absolute, but is relative to the material available to the authorities and to the conditions of the statutes which impose it; in particular the authorities, though only entitled to act on condition of the giving of notices and opportunities to object and appeal, are bound to act when those conditions have been fulfilled: the appellants have failed in none of these respects. No application was made for a mandamus that they should hear and determine, because they did hear and determine according to all the material then available.

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(1) [1907] 2 K. B. 793.

It is, however, contended (if I understand aright) that a new situation was created when the Court gave its decision on the special case, so that in consequence Quarter Sessions reversed its previous decision that the hereditaments were not industrial; this reversal, it is argued, having a retroactive effect necessarily involved a reconsideration of the Valuation List, 1930, so that the appellants, being notionally put back to the time when they were preparing the list for 1930, had then a ruling in law which they were bound to obey that the hereditaments were industrial, and were bound accordingly to insert them in Part II. because by some retroactive operation the hereditaments were to be deemed to have been at all material times in the Special List. It was contended that when in April, 1932, the appellants refused to do so, they were guilty by relation back of a breach of duty, which the Court ought to enforce by mandamus, though the time for performance has passed. I think the argument is fallacious. It is true that in certain cases a writ of mandamus may issue to perform a duty for which the time of performance fixed by law has passed. What difficulties may be involved in such a course is shown by the judgment in the *Mayor of Rochester* v. *The King* (1), where the successor of the delinquent Mayor was ordered to revise the burgess list of the previous year; in the Exchequer Chamber, Crowder and Williams JJ. thought the writ should not go, the Lord Chief Baron and Martin B. thought it should; with these latter Willes J. only agreed with grave doubts. But the same course has been taken in other cases, for instance, in *Rex* v. *Hanley Revising Barrister* (2), where by inadvertence voters had been left on the lists whose names the revising barrister had ordered to be struck off. In these and similar cases the duty had not been fulfilled and the Court has held, it may be with justification, that the statutory times are merely directory and that it is more in accordance with the intent of the statutes that the act should be done, though out of time, than not be done at all.

(1) E. B. & E. 1024.

(2) [1912] 3 K. B. 518.

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I cannot, however, apply this way of looking at things to such a case as the present, because the retroactive revision of the Valuation List, save as the statute provides, would in my judgment be contrary to the whole purpose and effect of the legislation. Times are here peremptory, not directory. Nor is the matter decided by reference to the retroactive effect of the final decree of Quarter Sessions, placing the hereditaments in Part II. of the Special List: that decree was no doubt retroactive, in regard to the question as arising in those proceedings, under the terms of s. 25, sub-s. 4, of the Judicature Act, 1925, and no doubt involved the conclusion in law that, if the facts were the same at the time of the formation of the 1930 list they should, apart from the other considerations, have been entered in Part II. in that list, but the decree had no retroactive effect in regard to that list, which had become conclusively settled without objection or appeal, and in my opinion could not be reopened. It is said that it is an injustice that the hereditaments should remain in List I., now that it is clear that in law they should be in List II., and that it is the function of mandamus to cut through procedural obstacles; but the answer is, in my opinion, that what the Courts deal with is justice according to law: law no doubt is concerned to achieve as far as possible just results, but it is also concerned to achieve finality: a state of things finally and without appeal established in accordance with the then current state of the law cannot be undone simply because a later and higher authority has in another case shown that the law was misconceived in the earlier case.

In the same way it is familiar law that mandamus will not be granted where there is another sufficient and convenient remedy, such as a right of appeal which for any reason has not been availed of: thus in *Reg.* v. *Smith* (1), where a liquor licence had been wrongly refused by justices, the Court refused to grant the mandamus so soon as it was satisfied that the party aggrieved had a right of appeal to Quarter Sessions: the authority of this case is not affected by *Reg.* v. *Thomas* (2), where mandamus was granted on the ground that the justices

(1) (1873) L. R. 8 Q. B. 146.

(2) [1892] 1 Q. B. 426.

had not determined the case in the proper form so as to enable an appeal.

It was further contended that in the present case there was no sufficient or convenient remedy at the time, because the respondents could not conveniently appeal, while in the case of the Special List the ruling of Quarter Sessions stood unreversed: it was contended that objections and appeals that could not have succeeded at the time and must have involved expense, delay and uncertainty could not be regarded as a convenient alternative remedy. I do not agree, nor do the cases relied on by the respondents go to support this contention of theirs. No doubt in certain cases the Court must consider carefully whether an alternative remedy is really effective. Thus in *Rex* v. *Poplar Borough Council* (No. 1.) (1), where a mandamus went against overseers to levy a rate, it was so decided on the ground that the remedy by distress was completely inadequate; similarly it has been held that the remedy by indictment, though adequate as punishment, may be wholly ineffective to ensure performance. I do not wish at all to underrate the importance of the Court carefully weighing the character and competence of the alternative remedy suggested in any case, but in such a case as this the remedy available by objection and appeal was in my opinion a course of procedure both sufficient and convenient in the true legal sense of these words.

I need not pursue these matters further. I shall simply add, in confirmation of my conclusion, that the application for mandamus was here misconceived, a reference to the form of order made: the order is simply to insert the hereditaments in Part II. of the 1930 list and is simply addressed to the appellants. But when, under s. 41 of the Act of 1869, an alteration has to be made in consequence of any decision on any appeal to Sessions or a Superior Court, the alteration must be entered both by the rating authority and the Assessment Committee on the duplicates respectively deposited with them; it is obvious that duplicates must agree; but no order is directed to the Assessment Committee to insert, nor did

(1) [1922] 1 K. B. 72.

the application include them, yet on any view they would, as I think, be necessary parties. Again the effect of the order as made is to deprive of their right of appeal in this matter the various interested parties named in s. 32 of the Act of 1869. I say nothing of the necessity of apportionment of values, if the hereditaments were shifted over to Part II. I merely mention these matters as sufficient without more to show how impossible it is in my opinion to fit the order of the Court of Appeal into the valuation scheme under the Acts. I should only desire to add that I do not think any reflection can be made on the appellants for resisting the application for mandamus. Indeed I do not think they could have done otherwise. To have acceded to the respondents' request would have been to fail in performance of their public duties under the relevant Acts.

In my opinion the appeal should be allowed, the order of the Court of Appeal should be set aside, the order of the Divisional Court discharging the rule nisi should be restored, and the respondents should pay to the appellants their costs here and below.

*Order of the Court of Appeal reversed: Order of the King's Bench Division of July* 22, 1932, *restored: Respondents to pay the appellants their costs in the Court of Appeal and also their costs of the appeal to this House. Cause remitted to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

*Lords' Journals*, March 6, 1934.

Solicitor for appellant: *E. F. L. Danbury, for Town Clerk, Stepney.*

Solicitors for respondents: *Redfern & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1934
March 27.

CAMMELL LAIRD AND COMPANY, LIMITED . . . . . . . . . . APPELLANTS;

AND

THE MANGANESE BRONZE AND BRASS COMPANY, LIMITED . . RESPONDENTS.

*Sale of Goods—Contract to manufacture propeller for particular ship—Plans and dimensions supplied by Purchasers—To be to the satisfaction of Shipowners and Shipbuilders—Implied Warranty of Fitness—Merchantability—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14.

A firm of shipbuilders agreed to build for and sell to the U. M. Company two sister ships with main propelling Diesel engines designed for carrying petroleum or molasses, each ship to be classed A1 at Lloyd's. The ships with their engines were distinguished in the shipbuilders' yard by the numbers 972 and 973.

The shipbuilders entered into a contract with the M. B. and B. Company, who were makers of ships' propellers out of manganese bronze prepared by a special process, for the manufacture of two propellers for these ships, to be of special Parsons manganese bronze, of a specified diameter, and pitch, each with four blades of a specified total developed area and of a maximum brake horse-power at a specified number of revolutions per minute. Each propeller was to be finished, chipped, and polished in style of the highest class, with boss bored, faced, and keyway cut to the shipbuilders' template, with edges brought up to fine lines, to be true to pitch; all in accordance with the shipbuilders' blue print, to be ready for fitting to the shaft on delivery; and to be to the entire satisfaction of the U. M. Company's representative and that of the shipbuilders themselves. They were to be delivered on July 14 and August 1, 1930, respectively. The working drawings gave the information necessary to enable the work to be carried out, including the thickness required along the medial lines of the blades; but beyond this and apart from the direction that the "edges" were "to be brought up to fine lines," further details as to the thickness of the blades were left to the skill and judgment of the M. B. and B. Company.

Two propellers constructed in accordance with the design and working drawing were passed by Lloyd's surveyor as satisfactory in tensile strength and similar respects, and were fitted to the two vessels. On trial the propeller fitted to No. 972 caused so much noise that the vessel could not be classed as A1 at Lloyd's and the U. M. Company would not accept it. The propeller which had been fitted to No. 973 was tried on No. 972 and proved satisfactory. The M. B. and B. Company then made a second propeller for No. 972, without prejudice to the rights of the parties. Although this propeller conformed with the design and working drawing, and was free from fault in other respects, it nevertheless showed the same defect as the former one, and the U. M. Company were again dissatisfied. The M. B. and B. Company then made yet another propeller upon the same terms as to the rights of the parties, and this last attempt proved satisfactory.

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* *Present:* LORD TOMLIN, LORD WARRINGTON OF CLYFFE, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and LORD WRIGHT.

The shipbuilders brought an action against the M. B. and B. Company claiming 6277*l.* 5*s.* 1*d.* damages for delay in executing the work and expenses incurred in consequence :—

*Held*, that the plaintiffs were entitled to recover on the grounds :—

(1.) that the defendants had failed to comply with the condition that the propeller should be to the entire satisfaction of the U. M. Company's representative ;

(2.) that the agreement was a contract for the sale of future goods and that the case fell within the first exception to s. 14 of the Sale of Goods Act, 1893, inasmuch as the plaintiffs had made known to the defendants the purpose for which the propeller was required, and relied upon their skill and judgment ; that it is not necessary for the purposes of that sub-section that the buyer should rely totally and exclusively on the skill and judgment of the seller for every detail in the production of the goods ; it is sufficient if reliance is placed on the skill and judgment of the seller to some substantial extent ; and that in the present case with regard to that part of the work which was left to the skill and judgment of the sellers there was a breach of the implied condition that the propeller should be reasonably fit for the purpose for which it was required.

*Manchester Liners, Ld.* v. *Rea, Ld.* [1922] 2 A. C. 74 applied.

Order of the Court of Appeal [1933] 2 K. B. 141 reversed.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Roche J.

The facts are stated in detail in the speech of Lord Tomlin and are summarized in the headnote.

The appellants, who were the plaintiffs in the original action, were a firm of shipbuilders who had agreed to build two vessels, the *Athelfoam* and the *Athelbeach*, for the United Molasses Company, Ld. They contracted with the defendants for the manufacture of two manganese bronze propellers to be fitted to the vessels, and complained of breaches of the contract (*a*) that the work should be done to the entire satisfaction of the United Molasses Company, and (*b*) under s. 14, sub-s. 1, of the Sale of Goods Act, 1893 (1), that each propeller should be reasonably fit for the purpose for which it was required.

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(1) [1933] 2 K. B. 141.

The case was entered in the Commercial List and heard by Roche J., who decided that there was a breach of the implied warranty, but no breach of the express stipulation that the work should be done to the satisfaction of the United Molasses Company. The defendants appealed to the Court of Appeal, and Scrutton and Lawrence L.JJ., Greer L.J. dissenting, held that there was no breach of the express term, and that the case was not within s. 14 of the Sale of Goods Act, 1893. Greer L.J. was of the contrary opinion on both points. The judgment of Roche J. was reversed.

The plaintiffs appealed to this House.

Feb. 6. *A. T. Miller K.C.* and *F. A. Sellers* for the appellants. This was a contract for the sale of future goods. The proper inference from the facts is that the appellants made known to the respondents the purpose for which the propellers were required. They were for " Engines Nos. 972/3." They were goods of a description which it was in the course of the respondents' business to supply. The only question upon this part of the case is whether the appellants in fact relied on the skill and judgment of the respondents. It is submitted

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 14: "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose ;

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed . . . . ."

that they did. It is not necessary for the buyer to show exclusive reliance on the skill and judgment of the seller. It is enough if, relying in part on his own judgment, he relies for the rest of the performance on the skill and judgment of the seller: *Medway Oil and Storage Co.* v. *Silica Gel Corporation* (1). If through the seller's error in judgment the work is not fit for its purpose, there is a breach of warranty within exception (1.) to s. 14 of the Sale of Goods Act, 1893. The respondents were not merely required to work to a pattern; they were required to produce a propeller for the *Athelfoam*. The nature and properties of the metal to be used were known to them and not to the appellants. The weight and thickness of the article was matter peculiarly for the skill and judgment of those who were familiar with the specially prepared material. The case therefore falls within the first exception to s. 14 of the Act above mentioned; there was an implied warranty that the propeller should be reasonably fit for the purpose for which it was required, and there was a breach of that warranty.

That being so, it cannot be said that the express stipulation, that the work should satisfy the United Molasses Company's representative, has been fulfilled; for, granting that the dissatisfaction must be reasonable, there was here good reason for dissatisfaction, namely the breach of the implied warranty. In short, the two grounds of defence stand or fall together.

[The following cases were cited :— *Jones* v. *Just* (2); *Drummond* v. *Van Ingen* (3); *Bristol Tramways, &c., Carriage Co.* v. *Fiat Motors, Ld.* (4); *Wallis* v. *Pratt* (5); *Manchester Liners, Ld.* v. *Rea* (6); *Andrews* v. *Belfield* (7); *Stannard* v. *Lee.* (8)]

Feb. 12. *Raeburn K.C.* and *H. G. Robertson* for the respondents. The appellants gave precise and detailed instructions for the manufacture of the propellers, and left nothing to the skill and judgment of the respondents. Therefore there was no implied warranty as to the fitness of the propellers for any particular purpose. The work was done

(1) (1928) 33 Com. Cas. 195.
(2) (1868) L. R. 3 Q. B. 197.
(3) (1887) 12 App. Cas. 284.
(4) [1910] 2 K. B. 831.
(5) [1911] A. C. 394.
(6) [1922] 2 A. C. 74.
(7) (1857) 2 C. B. (N. S.) 779.
(8) (1863) 3 B. & S. 364.

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according to the specification. The respondents had done their work when they handed over the propellers so made. They had nothing to say to, and no representative of theirs was present, at the fitting of the propellers to the vessels. They gave no guarantee except as to materials and workmanship. No sufficient reliance was placed on the skill and judgment of the respondents to bring the case within the first exception to s. 14 of the Sale of Goods Act, 1893.

When work has been done according to a specification the purchaser cannot refuse to accept it on the ground that he is not satisfied with it. Neither can a third party. Therefore the question of the United Molasses Company's approval does not arise.

Counsel was not called upon in reply.

The House took time for consideration.

March 27. LORD TOMLIN. My Lords, the appellants are shipbuilders with a shipbuilding yard on the River Mersey. The respondents are makers of ships' propellers and other articles made of manganese bronze manufactured in accordance with a special process belonging to the respondents.

On January 31, 1930, the appellants, by two separate contracts, contracted to build for and sell to United Molasses Company, Ld. (hereinafter called "the owners") two sister vessels subsequently named the *Athelfoam* and the *Athelbeach*.

Each contract provided for the building, fitting up and completion by the appellants at their own expense of the vessel therein referred to in accordance with agreed specifications and plans and for the purchase by the owners of the vessel when completed. Each vessel was to be constructed to be classed at Lloyd's 100 A1, for carrying petroleum or molasses, and all things necessary to obtain the classification were to be done by the appellants.

The *Athelfoam* was to be fitted with main propelling Diesel engines of "North-Eastern" type, to be constructed by the North-Eastern Marine Engineering Company, Ld. The maximum horse-power of these engines was 2300 shaft horse-power at 110 revolutions per minute.

The *Athelbeach* was to be fitted with main propelling Diesel engines of Burmester & Wain Harland & Wolff type to be constructed by Messrs. John G. Kincaid & Co., Ld. The maximum horse-power of these engines was 2150 shaft horse-power at 105 revolutions per minute. Except for the difference in the make of the engines there was to be substantially no difference between the two vessels.

The *Athelfoam*, which in the appellants' yard was known as No. 972, was to be completed and handed to the owners not later than 12½ calendar months from December 1, 1929. The *Athelbeach*, which in the appellants' yard was known as No. 973, was to be completed and handed to the owners not later than 13½ calendar months from December 1, 1929.

In February, 1930, the appellants, after some correspondence with the companies supplying the two sets of engines for the two twin vessels as to the most suitable form of propeller for such vessels, approached the respondents for a quotation for the supply of the necessary propellers. This approach led on April 14, 1930, to the placing by the appellants with the respondents of a provisional order for the propellers expressed, omitting formal parts, in the following terms :—

" Engines Nos. 972/3. With reference to your quotation of March 4 last amended per your representative on the 8th instant, we now place provisional order with you for one four-bladed right-hand solid bronze propeller for each of the above engines. The propeller to be 16 ft. 0 in. diameter with 11 ft. 3 in. pitch and to have a total developed area of 80 square feet in four blades. To be supplied by you finished machined complete, polished all over in the highest class style with boss bored and keyway cut to our templates. Edges brought up to fine lines, true to pitch, ready for fitting on to shaft, for the sum of 638*l*. each, delivered carriage paid to these Works. Our official order will be forwarded to you in the course of a few days."

The provisional order was acknowledged by the respondents in a letter dated April 15, 1930, in which they said :

" We note your official order will follow in the course of a few days and when sending same we should be obliged if

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you would kindly mention the maximum indicated horse-power with corresponding revolutions to enable us to check sections for guarantee purposes."

The guarantee referred to in this letter was apparently the usual guarantee given by the respondents against defective material and workmanship for a period of six months after handing over of the vessel to the owners.

On May 1, 1930, the appellants wrote to the respondents enclosing a working print No. 206,694, giving the information as to the horse-power and revolutions of the engine and asking whether the scantlings proposed (that is as shown on the working print) had their approval.

On May 19, 1930, the respondents wrote to the appellants "We confirm that the scantlings shown on your working print are in order on the basis of I.H.P." (indicated horse-power) "and revolutions you mention." On the same day the appellants placed with the respondents an order for the propeller of each of the two vessels.

The order for the propeller for the *Athelfoam* was as far as material in the following form :—

Messrs. Manganese Bronze & Brass Co. Ld.,
London.
Order No. M. 84126.
May 19, 1930.

Please supply and deliver, carriage paid, to us, at the following address

Cammell Laird & Co. Ld.,
Tranmere Engine Stores,
Birkenhead.

Job Engines No. 972.... .... .... ....

Propeller of special Parsons manganese bronze.

One four-bladed, right hand solid propeller, to be 16 ft. 0 in. diameter with a pitch of 11 ft. 0 in. and to have a total developed area of 80 square feet in 4 blades. Maximum B.H.P. [brake horse-power]—2150 at 105 R.P. [revolutions per] Minute.

Propeller to be supplied finished machined complete and polished all over in highest class style, with boss bored; faced; and keyway cut to our template, edges brought up to fine lines, true to pitch; ready for fitting to shaft on delivery.

Please notify us in good time when ready for templates.

Copy of pitch readings to be sent to us for our information.

Sweeps, boards, etc., to be supplied by you.

For further particulars see Print No. 206699 a copy of which you have.

To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of vessel to owners.

To be to the entire satisfaction of the owners' representative and ourselves.

Price 638*l*. 0*s*. 0*d*. lump sum.

The order for the propeller for the *Athelbeach* was in the same form mutatis mutandis, but with August 1 substituted for July 14 as the date of delivery.

It will be noted that in these orders the pitch had been altered from 11 ft. 3 in. as shown in the provisional order to 11 ft., and that a different working print is referred to. The alteration in pitch appears to have been the result of further consultation between the appellants and the makers of the engines and the new working plan gave effect to the alteration. This new working plan was in fact sent by the appellants to the respondents in a letter dated May 21, 1930, in which they said " we send you a copy of Print No. 206699 to which we require you to work." Some further correspondence took place as to price which was ultimately agreed at 672*l*. per propeller.

The appellants also later proposed again to alter the pitch but ultimately on June 14, 1930, they wrote to the respondents to make the pitch 11 ft. as originally ordered, adding: "It is, however, important that this figure should be a minimum and we should prefer that any errors in manufacture should tend to coarsen the pitch."

The working drawing to which the respondents were required to work showed according to the evidence of the respondents' experts the information necessary to enable the order to be carried out. This information included particulars as to the thickness required along the medial lines of the propeller blades, but beyond these particulars and the direction in the order " edges brought up to fine lines " there were no specific instructions as to the thickness of the blades.

Mr. Mearns, the manager of the respondents' marine department, stated in his evidence that all the rest of the thickness of the blade, apart from the thickness of the medial line, was a matter for the respondents as propeller experts, and that, if particular importance had been attached to the thickness of the edges, a dimension would be expected to be given by the appellants. The two propellers were in fact constructed in all respects in accordance with the design and working drawings within the limits of permitted tolerance, and were duly passed as satisfactory for tensile strength and other like matters by the surveyor of Lloyd's Register of Shipping. The blades of each propeller were brought to a fine edge in the usual way by chipping (sometimes referred to as machining), with the result that there were necessarily small variations in thickness at different points in the several blades.

The propellers were duly delivered and fitted to the two vessels, which then underwent trials. The propeller fitted to the *Athelbeach* proved on trial satisfactory, although there was some hum from it, and this ship was passed and classed at Lloyd's 100 A1 for carrying petroleum or molasses.

On the trial of the *Athelfoam*, which took place on November 20, 1930, a noise occurred when the engines were running at revolutions below 100 per minute of so serious a character that the vessel could not be passed and classed at Lloyd's as A1. At first it was not ascertained where the noise originated, but ultimately, after a number of trials and experiments, the source of the noise was ascertained to be in the propeller, though it remained a matter of controversy what characteristic of the propeller gave rise to the noise.

The respondents then provided a first replace propeller without prejudice to the rights of the parties. This first replace was constructed according to the same design and working drawing, and was duly passed for tensile strength and the like. This first replace also proved unsatisfactory for the same reason as the first *Athelfoam* propeller, although the noise made was considerably less.

A second replace was then provided by the respondents, again without prejudice to the rights of the parties. This second replace was constructed according to the same design and working drawing and was duly passed for tensile strength and the like. When fixed to the *Athelfoam* it proved satisfactory. In the course of the various trials which were made, the *Athelbeach* propeller was tried on the *Athelfoam* and found to operate quite silently.

All four propellers provided by the respondents were constructed in all respects in accordance with the specification and a working plan. In each case the thickness of the blades in their medial lines corresponded within permitted tolerances with the thicknesses prescribed in the working plan. There were differences of thickness in the blades in other respects. Speaking generally, in the neighbourhood of the base of the several blades, the blades or some of the blades of the satisfactory propellers were slightly thicker than the blades of the unsatisfactory propellers, and the weight of each of the satisfactory propellers was slightly greater than the weight of either of the unsatisfactory propellers. The engines of neither vessel displayed any unusual characteristic. Each propeller was properly fitted to the propeller shaft. Of the four propellers two were satisfactory in operation and two were unsatisfactory.

In these circumstances the appellants sued the respondents for 6277*l.* 5*s.* 1*d.* damages for breach of contract. The respondents counterclaimed for the price of the two replace propellers and for some expenses incurred by them.

Roche J., who tried the case, directed judgment to be entered in the action for the appellants for an amount of damages to be ascertained failing agreement by a special referee and also gave judgment in the appellants' favour on the counterclaim. The learned judge took the view that the case fell within s. 14, sub-s. 1, of the Sale of Goods Act, 1893, and that there had been a breach of the warranty there implied. He also decided some points of detail upon the amount of damages. He thought, however, that there had been no breach of the clause as to satisfying the owners' representative, having regard to the view which he took of the meaning of the clause.

On appeal the Court of Appeal by a majority (Greer L.J. dissenting) allowed the appeal, holding in effect that the case did not fall within either sub-s. 1 or sub-s. 2 of s. 14 of the Sale of Goods Act, 1893, and that the clause in the contract containing the words " to be to the entire satisfaction of the owners' representative and ourselves " had not on its true construction been breached.

Greer L.J., on the other hand, took the view that the last mentioned clause could not be read as meaning anything except that the propeller, in addition to being made to the specified dimensions, should be to the entire satisfaction of the owners' representative and the buyers, and that the respondents undertook that the propeller they made in accordance with the appellants' requirements should satisfy a third party, namely the owners, for whom the appellants were building the ship, and that there had been a breach of this term of the contract.

The case is one of considerable difficulty, but I have arrived at the conclusion that the view which Greer L.J. took of the meaning of the clause as to satisfaction is the correct one. It must be borne in mind that the owners were not parties to the contract between the appellants and respondents, that undoubtedly the contract left some matters undefined and to be determined according to the skill and judgment of the respondents, and that the propellers were being supplied to the knowledge of all parties for use as parts of ships which had to satisfy the owners' requirements. The owners knew nothing of the terms of the contract between the appellants and respondents and it seems natural that the appellants should in the circumstances of the case require the makers of the propellers to satisfy the owners. In fact it was not till each propeller was fitted to its ship and the ship was given its trial that the owners were in a position to express any satisfaction or dissatisfaction. In my judgment the language of the clause in question is apt to provide for and does provide for just such a position. The owners admittedly after the trials were dissatisfied and expressed dissatisfaction. Further, in my opinion it is the proper inference from all the facts that the source of the trouble lay in the region of the matters left to the skill and judgment of the respondents and that, even if the satisfaction clause was to operate only in respect of these matters, the owners were still entitled to express dissatisfaction.

I think therefore that the conditions of the clause were not fulfilled and that the respondents are liable in damages to the appellants for breach of it. The narrower meaning attributed to the clause by Roche J. and the majority of the Court of Appeal seems to me to deprive it of any real effect.

Upon the view which I take of the satisfaction clause the case can be disposed of without considering the effect of s. 14 of the Sale of Goods Act, 1893 ; but having had an opportunity of considering the opinion which is about to be read by my noble and learned friend Lord Wright, I desire to say that I agree with the views which he expresses upon the meaning of that section and upon its application to the facts of this case.

In my opinion the appeal should be allowed with costs, and as I agree with the learned trial judge upon the questions of detail in relation to damage, I think his judgment should be restored.

LORD WARRINGTON OF CLYFFE. (1) My Lords, I have carefully read and considered the opinions prepared by my noble and learned friend on the Woolsack, and my noble and learned friend Lord Wright. With these opinions I entirely concur, and can add nothing except that I wish to make it plain that in common with Lord Wright and with Greer L.J. I am clearly of opinion that the appellants have brought themselves within the provisions of s. 14, sub-s. 1, of the Sale of Goods Act. I rely particularly on *Manchester Liners, Ld.* v. *Rea, Ld.* (2) The point in that case was that reliance by the purchaser on the skill and judgment of the vendor may be inferred from the communication by the purchaser of the particular purpose for which the goods in question were purchased, and need not be supported by positive evidence, as the Court of Appeal in the judgment appealed from and reversed had thought. Lord Sumner (1) lays stress on the fact that the words are "so as to show" not "and also shows," and that these words are satisfied if the reliance is a matter of reasonable inference.

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(1) The opinion of Lord Warrington of Clyffe was read by Lord Macmillan.
(2) [1922] 2 A. C. 74.

On the face of the contract the purpose for which the offending propeller was ordered was for use with the engines of Job 972. There is evidence that the seller knew that these engines were to be Diesel engines with of course the peculiarities inseparable from engines of that type, and Roche J. so held. I agree that the buyer did sufficiently make known to the seller the purpose for which the goods were required. I am further of opinion that he did this "so as to show that he relied on the seller's skill and judgment." I agree with the conclusion of Lord Wright that such reliance need not be exclusive. Here there was a substantial area outside the specification, which was not covered by its directions and was therefore necessarily left to the skill and judgment of the seller. Without attempting to express an opinion on the actual cause of the trouble, I think it is clear that it arose from some defect in the seller's area. Four propellers were made, each in accordance with the specification. Two were noisy, two were not. The good one made for engine 973 proved satisfactory when fitted to engine 972. Of the two "replace" propellers made for 972 the first was noisy, the second was not. Defects in fitting are out of the question. In each case the specification was accurately followed. I cannot escape from the conclusion that the trouble in the case of the two rejected propellers arose in that part of the manufacture which was left to the seller's skill and judgment.

I concur in the motion proposed from the Woolsack.

LORD RUSSELL OF KILLOWEN. My Lords, we must approach this case upon the footing that the first two propellers which were made for the *Athelfoam* were the source of the excessive noise which prevented the *Athelfoam* from being classified by Lloyd's surveyor; but I do not feel that the evidence would

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(1) [1922] 2 A. C. 90.

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justify us in holding that any particular feature or detail in the construction of these propellers had been proved to be responsible for the noise. In view, however, of the facts that the *Athelbeach* propeller worked satisfactorily on both ships, that the third propeller which was made for the *Athelfoam* worked satisfactorily on the *Athelfoam*, and that both those propellers complied with all the particulars and details which were stipulated for in the contract and the blue print, we are entitled to say that none of *those* particulars or details can have been responsible for the defect. Each of the first two *Athelfoam* propellers had a serious defect, for which the appellants were in no way responsible, but which inevitably caused the representative of the owners of the *Athelfoam* to be dissatisfied therewith, and, indeed, to refuse to accept delivery of the ship on that account. Neither of those propellers was "to the entire satisfaction of the owners' representative."

There was therefore, according to the plain prima facie meaning of the words used in the contract, a breach of one of its express terms. I confess that I share Greer L.J.'s difficulty in seeing what answer there can be to the claim for breach of this express term. Both Roche J. and Scrutton L.J. dispose of this part of the case by saying that if the article is manufactured in accordance with the specification and is of good material and workmanship, the buyer has no right to express dissatisfaction about something else which is not in the contract, and thereby add a term to the contract. They both seem to overlook the fact that this contract requires the satisfaction of a third party who is a stranger to the contract, and who may know nothing of its terms. Lawrence L.J., although he does at one point refer to the owners, deals with the clause upon substantially the same footing, for he says (1): "The satisfaction of the person ordering the article must . . . . be limited to satisfaction with something which under the contract the manufacturer has bound himself to do."

Whether or not this view is correct as regards the buyer

(1) [1933] 2 K. B. 185.

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(as to which I express no opinion), I can see no ground for so limiting the clause as regards a stranger to the contract. In terms there is an obligation on the respondents to make a propeller which will satisfy a third person. No doubt the third person must act in good faith and not capriciously. But that is only to say in other words, that he must in fact be dissatisfied with the propeller before it can be alleged that the express term has been broken. I can find no justification for modifying the absolute nature of this term of the contract. Even if its operation were limited to satisfaction in respect of matters not specifically covered by the contract, the facts of this case fall within it, because, as indicated above, the cause of the noise must be some feature or property not covered by the specified particulars and details.

Nor can I see any ground for limiting the operation of the clause to satisfaction with the propeller as a manufactured article, and saying that it does not include satisfaction with the propeller in operation. But even so limited, the clause would apply here. The owner is dissatisfied with the propeller, not with its propelling; the dissatisfaction is with the propeller because it contains some feature or property which results in excessive noise. The dissatisfaction is with the propeller because, as manufactured, it contains that undesirable feature or property.

In my opinion the appellants are entitled to succeed on this ground alone.

In this view it is unnecessary to consider the provisions of the Sale of Goods Act, 1893, but I may say that, having read the opinion about to be delivered by my noble and learned friend Lord Wright, I agree with him that the appellants are also entitled to succeed upon the ground that the case is one which falls within s. 14, sub-s. 1, of that Act.

LORD MACMILLAN. My Lords, every aspect of this case is so fully discussed in the opinions of my noble and learned friends, which I have had the advantage of reading, that there is little left to say. In view, however, of the diversity of opinion in the Courts below, and as we are differing from the majority of the learned judges of the Court of Appeal, I may perhaps fittingly add a brief contribution in my own words.

It may seem surprising that a problem apparently so simple should have given rise to so much controversy. The respondents are specialists in the manufacture of ships' propellers. The appellants, who are shipbuilders, placed an order with them for a propeller for a ship which the appellants were building. The order stated the dimensions and other particulars of the propeller required, and referred for further particulars to a print containing detailed drawings. It was stipulated that the propeller should be to the entire satisfaction of the building owners' representative and of the appellants. The propeller when supplied and fitted to the ship was found on trial to be so noisy as to be quite unserviceable. The respondents supplied a second propeller which proved little better. Finally they supplied a third propeller which worked quite satisfactorily. The question is who is to bear the loss consequent upon the respondents having supplied to the appellants the two propellers which had to be discarded.

If there is one thing clear it is that the two discarded propellers were certainly not to the entire satisfaction either of the appellants or of the building owners' representative. There is no suggestion that their dissatisfaction was unreasonable or expressed otherwise than in good faith. There would thus seem to have been a plain breach of a specific stipulation of the contract. The respondents do not dispute that they undertook to supply a propeller to the entire satisfaction of the appellants and of the building owners' representative, but they say that this requirement had reference not to the working of the propeller but only to its manufacture. The stipulation, they submit, was met if the propeller as delivered at the appellants' premises was satisfactory to them as regards material and workmanship and conformity with the order and if no dissatisfaction with it was then expressed.

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My Lords, so narrow an interpretation of the stipulation appears to me to rob it of all business efficacy. The appellants wanted a propeller that would work. How could they know whether it was satisfactory until they had tried it? It has been proved that the unsatisfactory operation of the two discarded propellers was not due to the terms of the specification or to the way in which they were fitted to the ship or to any peculiarity in the ship itself or its engines, for at the third attempt the respondents supplied a propeller made to the same specification, which, when similarly fitted to the ship, worked satisfactorily; and a propeller made by the respondents to a practically identical specification for a sister ship also worked satisfactorily. The experts appear to have found great difficulty in ascertaining why the first two propellers worked unsatisfactorily; but it is, I think, demonstrated that the cause resided in the propellers themselves. I accordingly share the view of my noble and learned friends that the respondents are responsible for the loss occasioned by their failure at their first two attempts to supply a propeller to the satisfaction of the building owners' representative and the appellants.

The appellants also contended that they were entitled to succeed under s. 14, sub-s. 1, of the Sale of Goods Act, 1893. That section contains what is left of the rule of caveat emptor, but the exceptions have made large inroads upon it. The rule does not apply "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply"; in such a case "there is an implied condition that the goods shall be reasonably fit for such purpose."

Now there is no question that it is in the course of the respondents' business to supply ships' propellers. But there is room for argument as to whether the appellants made known to the respondents "the particular purpose" for which the propeller was wanted. On the one hand it was contended that no particular purpose was expressed or implied which the propeller was to serve, and that if any purpose was implied it was merely the ordinary and general purpose which all ships' propellers serve—namely, as the word itself connotes, the purpose of propulsion. On the other hand it was contended that the contract disclosed that the propeller was wanted for a particular purpose—the purpose, namely, of being fitted to and working in association with the ship and engines No. 972 which the appellants were building. Having regard to the decision and the reasoning in the case of *Manchester Liners, Ld.* v. *Rea Ld.* (1), I am of opinion that there was in the present instance sufficient disclosure of a particular purpose within the statutory meaning.

But that is not enough. To get the benefit of s. 14, sub-s. 1, the particular purpose must be so made known as to show that the buyer relies on the seller's skill or judgment. The respondents' argument was that the appellants by their detailed specification so tied the respondents' hands as to negative the idea that anything was left or intended to be left to their skill or judgment, except mere matters of material and workmanship, as to which there was no suggestion of failure on their part. That there was an important margin within which the respondents' skill and judgment had scope for exercise is best demonstrated by the fact already mentioned that while all the three propellers which they made for this ship were in conformity with the specification, it was only at the third attempt that the respondents succeeded in supplying a propeller that would work.

The defect, whatever it was, which existed in the first two propellers as well as the remedying of that defect achieved in the third propeller, thus lay in the region within which the respondents were free, so far as the specification went, to exercise their skill and judgment. I therefore reach the conclusion that there was room here for the exercise of the respondents' skill and judgment and I hold that the particular purpose for which the propeller was wanted was so made known to the respondents as to show that the appellants relied on their skill and judgment.

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(1) [1922] 2 A. C. 74.

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The appellants are thus entitled, in my opinion, to succeed on both the grounds which I have discussed.

LORD WRIGHT. My Lords, the facts of this case and the terms of the contract to be considered have been so completely dealt with by the noble and learned Lord on the Woolsack that I need not go over the ground again. As to the facts I only observe that it seems to be the fair inference that nothing in the specification or plan can account for the trouble which showed itself in two of the four propellers; nor can the explanation be found in the critical periods of the engines, which indeed were only such as might be expected in any Diesel engine of the stated horse-power and revolutions. Various theories were advanced: Roche J. thought that the cause might well be traced to what was called the trimming or machining of the propellers in regard to final shape and thickness. Only the medial thicknesses of the blades were specified; it was left to the discretion and skill of the respondents and their experienced workmen to bring the blade out to fine edges; the blades which came from the foundry in the rough were trimmed by hand according to the discretion of the respondents' men. There were small differences of weight in the different propellers and differences in the distribution of the weight, especially at the parts of the blade near the boss: these might account for an undue vibration and that might cause the noise. However this may be, it was admitted that the finishing was left to the skill of the respondents as makers; they were also responsible for the material and for scaling actual contours from the plans; in these and in other ways there were matters, outside the given plan and particulars, left to their discretion, and it seems a reasonable inference that it is in such matters that the obscure cause of the trouble is to be found. No one anticipated this peculiar difficulty.

In this state of things it must be determined on the true effect of the contract whether the appellants are entitled or not to succeed in their claim.

The contract is " unquestionably a contract for the sale of future goods, within the meaning of the Sale of Goods Act, 1893, this expression being defined by s. 62, sub-s. 1, as meaning goods to be manufactured or acquired by the seller after the making of the contract of sale." I quote as applicable to a propeller the language used in connection with a contract to build a ship by Romer J. in *In re Blyth Shipbuilding and Dry Docks Co.* (1) It is accordingly necessary to construe the contract in the light of the provisions of the Act.

On behalf of the respondents it has been contended that the opening words of s. 14 of the Act apply, and that the contract was to make the propeller in accordance with the specified design and dimensions and of good workmanship and materials as guaranteed by the contract, but with no further responsibility: in effect that would be a contract for work and materials. In support of this contention there was quoted a dictum of Lord Esher in *Hall* v. *Burke* (2), that where a plan is given or supplied for a machine to be made, the contract is fulfilled if the machine is made according to the plan and in a workmanlike manner. In that case the Court of Appeal held that the actual contract was to make the machine for a particular purpose, the manufacturer being left to design it and make it for that purpose, and that he was not relieved from his obligation to deliver the article ordered because the party giving the order had suggested alterations which the manufacturer had accepted and so was held to have made his own. The dictum now relied on was not necessary to the decision of the case; the case was before the Act; I know of no English decision in which such a contract has been so construed. Thinking as I do that the contract now under consideration is a contract for the sale of goods, and therefore is subject to the Act, I find it difficult to bring it within the provisions of the Act, unless it is to be regarded either as coming within the opening words of s. 14, that is, as being a contract in which there is no implied warranty or condition as to quality or fitness; or unless it is to be regarded as coming within s. 13 or s. 14, sub-s. 1 or 2. It seems to be at least a sale of future goods by description. I do not,

(1) [1926] Ch. 494, 499.

(2) (1886) 3 Times L. R. 165.

however, further consider these contentions as I think the contract is one falling within s. 14, sub-s. 1, of the Act.

In the first place I am of opinion that the appellants as buyers expressly and by implication made known to the respondents as sellers the purpose for which the goods were required. The tendency of the decisions since the Act has been to give a liberal interpretation to these words: they were considered by this House in *Manchester Liners, Ld.* v. *Rea, Ld.* (1), a case in which there was a contract for the sale of bunker coal for a named steamer; the coal tendered was unfit for use on the steamer, which had natural draught furnaces; for these furnaces the coal was wholly unsuitable. It was held by this House that the coal was ordered for a particular purpose. Lord Buckmaster said (2) "the order was expressed for the use of a particular steamship, and it must, therefore, be assumed that the respondents knew the nature of her furnaces and the character of the coal she used, for it was this coal they contracted to supply." Lord Dunedin said that the contract clearly disclosed the purpose. I cannot distinguish that case in principle from the present. In my opinion the contract now being considered was a contract, not for a propeller in gross, but a propeller as appurtenant to a vessel then being built by the appellants identified by the number they as builders had given to it; the respondents either knew all that was material to them as propeller makers to know about the vessel and her engines, or could have ascertained by inquiry. There is here no need to look beyond the actual terms of the contract to find the particular purpose. It is not necessary here to have recourse to writings or conversations between the parties outside the contract, or to other circumstances known to the parties involving the inference that at or before the date of the contract the particular purpose for which the buyers wanted the propeller was brought home to the minds of the respondents as contracting parties. All these matters it is permissible to consider if necessary in order to ascertain the parties' intention, and if here considered they go to support the view I have

(1) [1922] 2 A. C. 74.

(2) Ibid. 79.

expressed; but here, I think, the contract is sufficient for this purpose in itself. Nor is it necessary here to hold, as in *Preist* v. *Last* (1), that a particular purpose may be sufficiently established even where the thing bought is intended only for its ordinary use, though I am far from differing from the opinions expressed by Collins M.R. The present case presents, it may be, a closer analogy to that of *Bristol Tramways, &c., Carriage Co.* v. *Fiat Motors, Ld.* (2), where, however, the particular purpose for which the motor chassis were ordered, namely, for use in the streets of Bristol, was not to be found in the contract, but in extrinsic communications. I need not multiply citations: my conclusion is that the propeller was ordered not simply for use as a propeller on any ship, but specifically for use on ship No. 972 or more strictly perhaps, though I see no relevant difference, for use with engines No. 972.

But the more difficult question remains whether the particular purpose for which the goods were required was not merely made known, as I think it was, by the appellants to the respondents, but was made known so as to show that the appellants as buyers relied on the sellers' skill and judgment. Such a reliance must be affirmatively shown; the buyer must bring home to the mind of the seller that he is relying on him in such a way that the seller can be taken to have contracted on that footing. The reliance is to be the basis of a contractual obligation. The respondents have contended that there was no such reliance shown in this case in particular on the ground that the appellants by the plan which accompanied the order and by specifying the dimensions, the pitch ratio, the total developed area, the maximum horse-power, and so forth, had tied the hands of the respondents as to matters most material to the fitness of the propeller; and furthermore had not given information essential if the respondents were being relied on in respect of fitness of the propeller for its purpose, as to the nature of the ship, such as its under water construction, draught and so forth, or as to the special features of the engines, such as their critical periods: the

(1) [1903] 2 K. B. 148.

(2) [1910] 2 K. B. 831.

respondents accordingly contended that the appellants relied on their own judgment and not on that of the respondents. Alternatively it was contended that if they relied at all on the respondents they merely relied on them in the limited respects of material and workmanship, the obligations in respect of which were sufficiently covered by the six months guarantee: the respondents further contended that on the true construction of s. 14, sub-s. 1, the reliance must be total and absolute, a partial reliance being not within the section.

In dealing with these contentions, the first thing to be considered is, what is exactly the article which is the subject of the contract of sale, and what is the particular purpose for which it is required, in so far as relevant, as between the contracting parties. In some cases the matter may be very simple: the purpose for which a hot water bottle is required is easily determined and equally easy is it to determine the extent of reliance on the seller: similarly in the case of a piece of mechanism, intended to fit into a complete machine, the relevant purpose as between the buyer and the maker will normally be simply that it should be of the specified plan and, when properly fitted, work in its place: there is no reliance on the maker for the general performance of the machine as a whole. Similarly in *Manchester Liners, Ld.* v. *Rea, Ld.* (1) the bunkers were to be fit to burn in the furnaces but not to raise any given head of steam. The definition of the particular purpose will vary according to the contract in question.

To apply these considerations to the present case: the propeller is, as I conceive it, to be fit for ship and engines No. 972, but only as a propeller; that is, it has to work efficiently when fitted properly on the vessel; for instance, the blades must not snap, there must not be corrosion, it must work without excessive noise, and must revolve reasonably smoothly with the actual engines, these being Diesel engines: but the propeller makers are not concerned with matters relating to the ship and engines as a whole, such as matters of speed; for instance, if the propeller worked

(1) [1922] 2 A. C. 74.

efficiently as a propeller, it would not matter to the respondents if owing to something in the design of ship or engines, it could only propel the ship at two miles an hour. I think the true position is that the respondents accept the plan and specification and agree, by using what appears on these pieces of paper, to produce by their skill and experience a material object in Parsons manganese bronze capable of being properly described as a propeller and being, in addition to being of the prescribed design and dimensions, also fit to operate as a propeller with ship and engines No. 972. The appellants stated what sizes, shapes and so forth they thought would suit their vessel and engines. No doubt they had in mind some ideas as to the speed and the power to be achieved with the help of the propeller, but what the respondents had to do was to follow the instructions given them as to design and so forth, and produce something which being of that design and size would function as a propeller. The conclusion I arrive at is that in all matters relevant as between these parties to the creation of a propeller for No. 972, there was reliance on the sellers' skill or judgment within the section.

But it is said this conclusion would throw on the makers responsibility for defects in the plan and design, for instance, if a propeller of the specified plan and design could not be physically cast, or would be too weak, or otherwise could not be fitted to or worked on No. 972. I have pointed out that on my view of the facts none of these difficulties arise here. It has been laid down that where a manufacturer or builder undertakes to produce a finished result according to a design or plan, he may be still bound by his bargain even though he can show an unanticipated difficulty or even impossibility in achieving the result desired with the plans or specification. Such a case was *Thorn* v. *Mayor and Commonalty of London* (1), where under a building contract the contractor sought to set up an implied warranty by the other contracting party that the bridge could be built (or built without undue expense) according to the plans and specification, but this House decided against any such warranty. Again in *Gillespie* v.

(1) (1876) 1 App. Cas. 120.

*Howden* (1) the Court of Session held it was no defence to a shipbuilder who had contracted to build a ship of a certain design and of a certain carrying capacity, that it was impossible with the approved design to achieve the agreed capacity: the shipbuilder had to answer in damages. Though this is the general principle of law, its application in respect of any particular contract must vary with the terms and circumstances of that contract, but I see no reason why in regard to this contract the respondents should not be held to be subject, under the terms of s. 14, sub-s. 1, of the Act, to the implied condition that the propeller they made should be reasonably fit for use on Ship No. 972. Obviously it was their business to supply propellers.

I do not say that such a condition must necessarily be implied in every case where a manufacturer contracts to make a machine or article for a particular purpose; every case in which the issue is whether the terms of s. 14, sub-s. 1, have been fulfilled, must present its own questions of fact and degree. But in my opinion there is no general rule that where a maker agrees to make a machine of a description which it is in the course of his business to supply, in accordance with a design or specification given him by the buyer, s. 14, sub-s. 1, must necessarily be excluded. There is no such proviso to s. 14, sub-s. 1: the actual proviso relates to the case of the sale of a specified article under its patent or trade name; what is there included corresponds to the third category, given in the judgment of the Court of Queen's Bench in *Jones* v. *Just* (2): "Where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." This statement is supported by a reference to *Chanter* v. *Hopkins* (3), where the article was sold either under a patent or a trade name. The section, however, has not laid down any further limitation beyond the proviso, but has left the Court to decide on the circumstances of each case whether or not s. 14, sub-s. 1, is to be applied.

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(1) (1885) 12 R. 800.

(2) (1868) L. R. 3 Q. B. 197, 202.

(3) (1838) 4 M. & W. 399.

However the appellants are in my opinion entitled here to succeed on s. 14, sub-s. 1, on a narrower ground. I do not agree with the construction sought to be put by the respondents on s. 14, sub-s. 1: I do not agree that the reliance on the seller's skill or judgment must be total or exclusive. If it is conceded that in some cases under the section a distinction may be drawn, where articles are ordered to be made, between such part of the maker's obligation as is merely to follow precisely what is specified, and such part of his obligation as involves in its discharge the exercise of his skill and experience, then I think it follows that, to quote the language of Lord Macnaghten in *Drummond* v. *Van Ingen* (1): "In matters exclusively within the province of the manufacturer the merchant relies on the manufacturer's skill." Lord Sumner, in an opinion with which the other members of this House agreed, in *Medway Oil and Storage Co., Ld.* v. *Silica Gel Corporation* (2) said of s. 14, sub-s. 1, of the Act: "The section does not say that the reliance on the seller's skill and judgment is to be exclusive of all reliance on anything else. . . . . It follows that the reliance in question must be such as to constitute a substantial and effective inducement which leads the buyer to agree to purchase the commodity." Lord Sumner was there considering the different case where there was no reliance on the seller because the buyer made his own investigations before deciding to order a new and experimental machine which it was claimed would successfully carry out a novel process, but his opinion that the reliance need not be exclusive in that sense, throws light I think on the construction of the section. It is said that the words "relies on the seller's skill and judgment" cannot apply to a case where the reliance is not total or exclusive, where, for instance, the buyer specifies so much and leaves so much to the seller's skill and judgment. I have already pointed out that even in such a case, the seller's skill in manufacture must be relied

(1) (1887) 12 App. Cas. 284, 297. (2) 33 Com. Cas. 195, 196.

upon to embody the design in the material, but apart from that I do not find in the section anything inconsistent with a division of reliance, the buyer relying in part on himself and in part on the seller; there will then be the implied condition of fitness in regard to that latter part, so that the seller will be responsible for a breach of that condition. On my understanding of the facts as explained above, the appellants are entitled to succeed even on that narrower basis.

The language of the section certainly does not expressly exclude such a view: the word "solely" is not expressed and there is no need to imply it: indeed the earlier words are elliptical and general, "so as to show that the buyer relies on the seller's skill and judgment," without defining for what purpose, or in what respect, or to what extent, or whether wholly or partially. On Lord Sumner's interpretation that reliance need not be "exclusive," though it must be substantial and effective, it follows, I think, that a reliance partial but substantial and effective, will bring the implied condition into play: it would then be a matter for construction of the particular contract whether the condition that "the goods shall be reasonably fit for such purpose" is to be read without qualification or whether it is to be limited to the matters within the particular province entirely left to the seller's skill and judgment. There are no doubt in fact many such cases of limited reliance. A very common case in which the implied condition is invoked is where an article made to a design exhibits a defect originally latent; or where goods purchased on sample but for a particular purpose, fail to answer the purpose though they correspond to the sample. I may refer to two cases before the Act: in *Macfarlane & Co.* v. *Taylor & Co.* (1) the buyers accepted a sample of spirits as satisfactory to them in strength, flavour and price, but, since the colour was too light, required the sellers not only to deliver a bulk equal to sample, but also of a darker colour: the sample fixed everything but the colour, the process of changing which was left to the seller's judgment: the ingredient used by the seller for that purpose had however consequences alarming to the natives for whose consumption the spirits were intended, and the spirits being therefore unfit for the particular purpose the sellers were held liable to pay damages. In *Jones* v. *Bright* (1), as explained by Lord Macnaghten in *Drummond* v. *Van Ingen* (2), the buyer's shipwright had himself selected at the seller's warehouse the copper sheathing for the ship he was repairing: when placed on the ship the sheathing decayed because of some intrinsic defect in the copper; no one, however, could tell what the cause of the defect was. Lord Macnaghten, after stating that the Lord Chief Justice "based his judgment on the broad principle that manufacturers were bound to supply an article fit for the purpose for which they knew it was required," went on to say: "I can see no distinction between a sale by sample where the sample gives incomplete and consequently misleading information, and a case where the purchaser selects the goods in bulk, and those goods have an intrinsic defect not discoverable on inspection."

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(1) (1868) L. R. 1 H. L. Sc. 245.

I regard these as authorities for the proposition that the condition of fitness may in proper cases be implied where it was only in some respects that the buyer relied on the seller's skill and judgment. It is true that if it could be shown that the language of s. 14, sub-s. 1, is such that the reliance must be total in extent, these cases are no longer in accordance with law; codification in formally defining the law may not only stop its growth, but also depart from the old law: but I see no reason to attribute these results to s. 14, sub-s. 1, in which the generality of phrase may be deemed to be intentional. I need not repeat the truism that the section does not lay down peremptory law but merely gives a canon of construction in cases where the prescribed circumstances call for it and there is no expressed agreement to the contrary.

In my opinion the appellants are entitled to succeed on the basis of s. 14, sub-s. 1, of the Act.

They have an alternative claim on s. 14, sub-s. 2, which has been argued and must be considered. The implied condition under that sub-section is merely that the goods should be of merchantable quality, subject to the proviso that if the goods have been inspected by the buyer, the condition does not apply to defects which such examination ought to have revealed. This proviso is based on the theory that in the case of a latent defect the examination could not have revealed the defect and therefore should be deemed pro tanto to be no examination at all. The circumstances under which the condition is to be implied involve a less onerous burden of proof on the buyer, since it arises prima facie in all cases of goods sold by description, but the remedy is less beneficial. It seems to have been the earliest form in which the common law declared the remedy of an implied warranty in sales of goods. In earlier times, the rule of caveat emptor applied, save only where an action could be sustained in deceit on the ground that the seller knew of the defect, or for breach of express warranty (warrantizando vendidit). But with the growing complexity of trade, dealings increased in what are now called "unascertained or future goods," and more generally "goods sold by description." As early as 1815 in *Gardiner* v. *Gray* (1) Lord Ellenborough stated the rule. Goods had been sold as waste silk; a breach was held to have been committed on the ground that the goods were unfit for the purpose of waste silk and of such a quality that they could not be sold under that denomination. What sub-s. 2 now means by "merchantable quality" is that the goods in the form in which they were tendered were of no use for any purpose for which such goods would normally be used and hence were not saleable under that description. To apply this principle to the present case, the question is whether the defective propeller could be used as a propeller not merely on No. 972 but on any vessel: it is immaterial to consider if it could be sold as scrap: thus in *Asfar & Co.* v. *Blundell* (2) dates were held to be unmerchantable as dates because they had been submerged in the Thames and had become impregnated with sewage and were useless as dates, though they were of considerable value for distillation into vinegar.

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(1) (1829) 5 Bing. 533.

(2) 12 App. Cas. 284, 299.

Roche J. found "that this propeller was not suitable on this ship, the defendants have not tried it on any other ship and I find that the propeller was not fit for use as a propeller at all." Greer L.J. was of opinion that there was no evidence that the propeller had faults that made it unsuitable as a propeller ; it might have done fairly well for some other vessel. On the whole I agree that the breach of this implied condition is not established. If I were able to draw inferences at large, I should be disposed to think that a propeller of this size and design, ordered for a particular ship, is not likely to be of use for any other ship unless a sister ship : it is not like a standardized propeller for a standardized ship : hence if it was not usable on the *Athelfoam*, and no one thought it worth while to try it on the *Athelbeach* or any other vessel, the true inference may well be that it was of no use for anything but scrap. Still this is a matter of fact which it was for the appellants to establish by evidence, and I cannot find that they had done so. I think the appellants fail on this point, which it is fair to say they did not press.

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(1) (1815) 4 Camp. 144.

(2) [1896] 1 Q. B. 123.

An argument was adduced by the respondents based on the clause in the contract "To be guaranteed against defective material and workmanship for a period of six calendar months after handing over of the vessel to owners." This clause was relied on as negativing by its express terms any implied condition under the Act, whether under s. 14, sub-s. 1 or 2, or under s. 13, which latter section deals with the implied condition that goods sold by description must correspond with the description. But on the view I have expressed as to the construction of the contract, that is that it is a contract for the sale of future goods by description subject to the conditions under s. 14, the matter is concluded against the respondents by the decision of this House in *Wallis* v. *Pratt* (1), in which case it was held that though the statutory conditions may be excluded or varied by the express agreement of the parties, yet such a clause as this, in which the word condition is not used, is ineffective to exclude the conditions implied under the Act. The same principle was applied in *Baldry* v. *Marshall.* (2) The principle of these authorities is that though a condition is deemed to be and can be treated as a warranty, if it is not availed of to reject the goods, still it remains a condition ; once a condition always a condition : hence apt and precise words must be used to exclude it : the words guarantee or warranty are not sufficiently clear.

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(1) [1911] A. C. 394.

(2) [1925] 1 K. B. 260.

Finally there must be considered a third substantive ground on which the appellants claim to succeed : that is on the clause in the contract "To be to the entire satisfaction of the owners' representative and ourselves." In fact the owners by their representative expressed dissatisfaction with the propeller, when its defects became obvious on trial. No one could say that their dissatisfaction was not bona fide or reasonable. In the Courts below Roche J. and Scrutton and Lawrence L.JJ., held that this clause did not assist the appellants. Greer L.J. forcibly expressed his opinion that on the clause alone, apart from any other grounds, the appellants were entitled to judgment. The argument on behalf of the respondents on this point was that the clause referred in point of time to the moment at which under the contract the propeller was delivered at the appellants' Tranmere Engine Stores, at which time it was said the satisfaction must be either expressed or negatived : the satisfaction contemplated had reference, it was further contended, not to the performance or operation of the propeller after being fitted and put into use, but merely to its construction and to the ordinary tests and inspection during construction and on delivery. Though I do not feel able so to limit this clause, I find it difficult to define the exact scope of its application, for some limits it must have. It would clearly not extend to complaints, for example, which the owners might make if the ship failed to achieve the contract speed, even though that failure was in some way due to the design of the propeller : the respondents had no concern with such matters, nor could the owners express dissatisfaction with the plan and dimensions, to which the respondents had to work, or express dissatisfaction on the ground that owing to bad fitting the propeller operated badly. On the other hand, the contentions of the respondents seem to me unduly to narrow the operation of the clause. The clause follows the clause just preceding which deals with certain defects developing within a period of six months after handing over of the vessel to the owners, that is to say with the propeller fitted. I cannot think that the satisfaction contemplated was not meant to refer to a time at least when the owners had the opportunity of judging, after testing the propeller in operation, if they were satisfied, and that time must, I think, at least fall within the period of trials after the propeller had been fitted: otherwise the clause as to satisfaction would simply be nugatory. It is true that the clause cannot be intended to deal with matters outside the scope of the respondents' obligations under the contract, or to enlarge these obligations except in so far as these are enlarged because there is superadded the judgment of a third party. But the defects complained of were defects of quality of the propeller, even if only apparent on trial and in operation, and were defects for which on any construction that I can give to the contract, the respondents were responsible. It is not easy to define precisely the scope of a loosely expressed and very general clause like this, but on the whole I think it must be taken to cover such defects as the propeller actually exhibited, so that the owners were entitled to express dissatisfaction as they did when the defects were disclosed. In my opinion, therefore, in the facts of the case, the clause, read as it must be in conjunction with the general scope of the contract, entitles the appellants to succeed on that ground alone.

I can shortly deal with the remaining question as to the measure of damages. The appellants claimed that they were entitled by way of damages to the expenses incurred in all trials, other than the costs of the first trial, which in any event would have been incurred in ordinary course, and also to all other expenses thrown away in experiments and attempts to ascertain and correct the cause of the trouble. Roche J. and Greer L.J. held that this claim was justified, and I agree with them in holding that all expenses reasonably incurred in consequence of the respondents' breach of contract should be recoverable. A special referee will determine

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what is reasonable. The appellants paid for the first defective propeller but refuse payment of the other two supplied as replace propellers and I think are justified in so doing.

For these reasons I think the appeal should be allowed and the judgment of Roche J. restored, with costs here and below.

*Order of the Court of Appeal so far as complained of reversed and judgment of Roche J. thereby set aside restored: Respondents to pay appellants the costs incurred by them in the Court of Appeal and their costs of the appeal to this House: Ordered that the cause be remitted to the King's Bench Division of the High Court of Justice to do therein as shall be just and consistent with this judgment.*

*Lords' Journals*, March 27, 1934.

Solicitors for appellants: *Gregory, Rowcliffe & Co., for Laces & Co., Liverpool.*

Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

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May 7.

UNITED GAS AND FUEL COMPANY OF HAMILTON, LIMITED, AND OTHERS . . . APPELLANTS;

AND

DOMINION NATURAL GAS COMPANY, LIMITED . . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Canada (Ontario)—Municipal Corporation—By-law—Franchise for supply of gas—Area annexed to adjoining City—Consolidated Municipal Act,* 1903 (3 *Ed.* 7, *c.* 19; *Ont.*), *ss.* 24, 56, 566—*Municipal Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 43; *Ont.*), *s.* 33.

The effect of a by-law passed by the council of a township in Ontario under the Consolidated Municipal Act, 1903 (Ont.), s. 566, sub-s. 3, authorizing a company, incorporated with suitable powers, to lay mains under the streets of the township and to supply its inhabitants with gas, together with an agreement by the company accepting the by-law and its conditions, is to confer upon the company (the conditions being fulfilled or waived) a valid and perpetual franchise, not subject to repeal, applying to the geographical territory which at the date of the by-law was comprised in the township. Upon parts of that territory being annexed to an adjacent city, under provisions of the above Act as amended and the Municipal Act, 1913 (Ont.), the franchise remains effective in and applicable to the annexed areas. In those areas the municipality of the city after the annexation takes the place mutatis mutandis of the municipality of the township to all intents and purposes as regards the rights and obligations created by the by-law and relative agreement.

Judgment of the Court of Appeal for Ontario [1933] O. R. 369 affirmed.

APPEAL (No. 52 of 1933) from a judgment of the Court of Appeal for Ontario (April 24, 1933) affirming a judgment of Wright J. (July 8, 1932).

By an agreement of March 24, 1931 (confirmed by the legislature), the city of Hamilton granted to the appellants an exclusive franchise for ten years to conduct, distribute, supply and sell gas in the city, except (inter alia) to the extent of any existing rights and privileges held by the

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* *Present:* VISCOUNT SANKEY L.C., LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and LORD MACMILLAN.

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respondents under by-law No. 533 of the township of Barton and the agreement entered into pursuant thereto.

The Courts of Ontario by the judgments appealed from held that the respondents had the right under by-law No. 533, which was passed in 1904, to lay mains and to supply gas in any street which at the date of the by-law was within the township, although that street was in an area which had since been annexed to the city of Hamilton under statutory powers. The judgments are reported at [1932] O. R. 559 and [1933] O. R. 369.

1934. Mar. 8, 9, 11, 12, 13, 16, 19, 20, 22, 23. *Tilley K.C.* and *Horace Douglas* for the appellants.

*Rowell K.C.*, *Lynch Staunton K.C.* and *Edmund Sweet K.C.* for the respondents.

The arguments appear from the judgment. Reference was made to *John Mackay & Co.* v. *Toronto Corporation* (1); *British Columbia Electric Ry. Co.* v. *Stewart* (2); *Toronto & York Radial Ry. Co.* v. *Toronto Corporation* (3); *County of Wentworth* v. *Hamilton Radial Electric Ry. Co.* (4); *City of Calgary* v. *Canadian Western Natural Gas Co.* (5); *Union Natural Gas Co. of Canada* v. *Chatham Gas Co.* (6), *Waterous Engine Works Co.* v. *Palmerston Corporation* (7); also, as to the duration of the respondents' franchise, to *Llanelly Ry. & Dock Co.* v. *L. & N.W. Ry. Co.* (8), and *Crediton Gas Co.* v. *Crediton U. D. C.* (9)

May 7. The judgment of their Lordships was delivered by

LORD MACMILLAN. The main question which their Lordships have to consider in this appeal concerns the effect of the transfer of certain areas in the Province of Ontario from one local government jurisdiction to another upon the rights and powers of a public utility company operating in the areas transferred. Questions relating to the scope and validity of the company's rights and powers are also raised.

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(1) [1920] A. C. 208.
(2) [1913] A. C. 816.
(3) (1916) 86 L. J. (P. C.) 119.
(4) (1916) 54 Can. S. C. R. 178.
(5) (1917) 56 Can. S. C. R. 117.
(6) (1918) 56 Can. S. C. R. 253.
(7) (1891) 20 O. R. 411.
(8) (1875) L. R. 7 H. L. 550.
(9) [1928] Ch. 447.

In the year 1904 the Dominion Natural Gas Company, Ld., the present respondents (hereinafter called "the Dominion Company") were incorporated under the Ontario Companies Act by letters patent which stated the purposes of the company to be (inter alia) "subject to the provisions of the Act respecting companies for supplying steam, heat, electricity or natural gas for light, heat or power, to construct, manitain, complete and operate works for the production, sale and distribution of electricity or natural gas for the purpose of light, heat and power." The Companies Act then in force in Ontario was c. 191 of the Revised Statutes of Ontario, 1897, and the Act referred to in the foregoing quotation from the letters patent was c. 200 of the Revised Statutes of Ontario, 1897.

The last-mentioned Act authorizes the incorporation under the Companies Act of any five or more persons who desire to form a company for supplying (inter alia) natural gas for the purposes of light, heat or power in any city, town, incorporated village, township or other municipality. The third section empowers every such company to construct, maintain, complete and operate works for the production, sale and distribution of natural gas for the purposes of light, heat and power, and to "conduct the same by any means through, under and along the streets, highways and public places of the city, town or other municipality; but as to such streets, highways and public places only upon and subject to such agreement in respect thereof as shall be made between the company and the municipality, and under and subject to any by-law of the council of the municipality passed in pursuance thereof." By s. 4 there are incorporated and applied certain sections of another Act—namely, c. 199 of the Revised Statutes of Ontario, 1897, entitled "An Act respecting Joint Stock Companies for supplying Cities, Towns and Villages with Gas and Water." Of these incorporated sections it is necessary for the present purpose only to quote in part s. 22: "The company may break up, dig and trench so much and so many

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of the streets, squares, highways, lanes and public places of the municipalities for supplying which with gas or water or both the company has been incorporated as are necessary for laying the mains and pipes to conduct the gas or water or both from the works of the company to the consumers thereof . . . ." These two statutes, cc. 199 and 200, R. S. Ont., 1897, may be described as being of the nature of Clauses Acts, containing as they do a general code of powers and duties appropriate to the classes of public utility companies to which they relate.

Such being the powers with which by these statutes the Dominion Company was at its inception equipped, it proposed to supply, among other places, the township of Barton, which immediately adjoins the city of Hamilton, with natural gas derived from the extensive gas wells which it controlled in Haldimand County, to the south of Hamilton. In order that it might get access to the streets of the township it was necessary for it, under s. 3 of the statute, c. 200, R. S. Ont., 1897, above quoted, to enter into an agreement with the municipality and also to conform to any by-law which the council of the municipality might pass in pursuance thereof. The council of the Barton municipality was agreeable, and on October 26, 1904, passed a by-law, No. 533, granting to the Dominion Company by article 1 thereof, "the consent, permission and authority of the township of Barton to enter upon" certain specified "highways in the township . . . . and to dig trenches and lay and bury therein and to maintain operate and repair mains and pipes of such sizes as the said company may require for the transportation and supply of natural or manufactured gas in and through the said township of Barton for fuel, heating and lighting purposes." The second article of the by-law provides that "from and after the construction and laying of the pipes on the main line and branches hereinbefore [i.e., in article 1] expressed and duly connecting the said branch lines with the mains but not before," the Dominion Company should "be at liberty to enter upon any and all other highways in the township of Barton and to dig trenches and lay and bury therein and to maintain and operate and repair mains and pipes of such sizes as the said company may require for the transportation and supply of natural or manufactured gas in the said township of Barton for fuel, heating and lighting purposes." The by-law, the terms of which are very fully set out in the judgment of the learned Chief Justice of Ontario, proceeds to deal in detail with a number of other matters affecting the gas supply. For the present it will suffice to mention article 22, which required the Dominion Company to commence on or before May 1, 1905, and to complete before November 1, 1905, a certain specified pipe line (not being one of those mentioned in article 1); and article 21, which provided that the by-law should not take effect or be binding on the township corporation unless formally accepted by the Dominion Company within one month by an agreement legally binding it to perform and comply with all the terms of the by-law, which agreement was, after being approved by the township solicitor, to be executed by or on behalf of the Dominion Company and the township, whereupon "the terms and conditions of this by-law shall extend to and be binding on the parties hereto, their successors and assigns."

Accordingly, on November 19, 1904, an agreement was entered into between the Dominion Company and the Corporation of the township of Barton whereby the Dominion Company accepted the by-law and "for themselves their successors and assigns" agreed to observe all its terms and on or before May 1, 1905, to commence to lay pipes in the township and have the lines and branches set forth in the first and twenty-second articles of the by-law completed by November 1, 1905, and ready to deliver gas to consumers in the township according to the terms of the by-law, and further undertook to "furnish gas to all parties in the township (who shall make demand therefor) in accordance with the terms and conditions of said by-law" so soon as the line and branches set forth in the first article of the by-law were completed.

It is necessary to pause here in order to ascertain the powers which the township of Barton possessed to grant the privileges thus conferred on the Dominion Company. These are to be found in the Consolidated Municipal Act, 1903 (Statutes of Ontario, 3 Edw. 7, c. 19) then in force. Under Part VII. of that statute—" Powers of Municipal Councils," Title I.—" Powers in General," Division XII.—" Water, Light and Heat," it is provided by s. 566 that by-laws may be passed by the councils of townships, etc.: " 3. For authorizing any gas . . . . company to lay down pipes or conduits and other things under streets or public squares subject to such regulations as the council sees fit." In another part of this Act under title II.—" Powers and duties of councils as to highways and bridges," Division I.—" General provisions," it is enacted by s. 599 that the soil and freehold of highways shall be vested in the Crown; by s. 600 that the municipal councils shall have jurisdiction over the original allowances for roads and highways within the municipalities; and by s. 601 (under the heading " Possession in municipalities ") that every public road, street or other highway in a township shall be vested in the municipality.

The Dominion Company being thus constituted and empowered and, as it conceived, in a position to begin operations in the township of Barton, proceeded to lay down mains and a distributing system in the township and to supply gas to the inhabitants. The question whether and to what extent it strictly fulfilled its obligations under the by-law and agreement in the matter of the construction of mains may in the meantime be postponed.

But the Dominion Company had not long been in the enjoyment of its privileges in the township when the adjoining city of Hamilton proceeded to annex first one and then another portion of the area of the township. The first annexation after the advent of the Dominion Company took place on September 3, 1908, and this was followed by further annexations in 1909, 1910, 1912, 1914 (2.), 1920, 1924, 1925, 1928 (2.), and 1929. The area annexed in 1909 was the largest and most important single area absorbed by the city.

The possibility that these numerous transfers of areas from the township to the city might have the effect of abridging the Dominion Company's rights and duties under the Barton by-law and agreement does not seem to have been adverted to, and for many years the Dominion Company continued to supply gas and to extend its distributing system in areas which had ceased to be in the township of Barton and had become incorporated in the city of Hamilton. The authorities of the city, indeed, so far from raising any objection, repeatedly recognized the presence and operations of the Dominion Company within the annexed areas. The city engineer regularly granted permits to the Dominion Company to open streets and lay mains and pipes in them. There was a short period in 1929–30 during which the city Board of Control decided that such permits should not be granted, while at the same time intimating that they would not interfere with the Dominion Company's operations. On April 1, 1930, however, the Board of Control, after taking legal advice, expressly authorized the city engineer to issue permits to the Dominion Company for the laying of gas mains "in that portion of the city formerly in the township of Barton wherein the company had franchise rights." In a series of by-laws passed by the city council in 1921 and relative agreements to which not only the Dominion Company and the corporation of Hamilton but also the present appellants were parties, and which related to the supply and price of gas, the position of the Dominion Company as a distributor of gas in the eastern portion of the city of Hamilton under the provisions of the Barton by-law No. 533 is consistently recognized.

As a result of the policy thus pursued by the city of Hamilton and the Dominion Company the latter has now in operation an extensive gas distributing system within the present city of Hamilton in areas which were formerly in the township of Barton, a considerable portion of which system was laid down after the annexation of these areas.

It is next necessary to consider in turn the position of the appellants, the United Gas and Fuel Company of Hamilton, Ld., formerly named the Ontario Pipe Line Company, Ld., whom it will be convenient to call "the United Company" throughout, irrespective of their change of name. On

September 26, 1904, the council of the city of Hamilton passed a by-law No. 400 granting the consent, permission and authority of the corporation to the United Company to enter upon the streets of the city, dig trenches, and lay therein and maintain and operate mains and pipes for the transportation and supply of gas in the city. By article 16 the United Company was required to commence laying mains and pipes within the city not later than May 1, 1905, and within six months thereafter to have at least ten miles of mains laid in the streets and to supply gas to the inhabitants. The privileges granted by this by-law were to subsist until September 26, 1924, subject to continuance in certain contingencies. As in the case of the Barton by-law in favour of the Dominion Company, the Hamilton by-law imposed an elaborate series of obligations on the United Company and was followed by a similar agreement between the city and the United Company.

The United Company, in order to obtain the gas necessary to fulfil its obligations to the city of Hamilton, entered into an agreement with the Dominion Company on September 25, 1905, whereby, on the recital that the latter had large natural gas resources for which it desired a market and the United Company had certain rights and franchises granted to it by the city of Hamilton to furnish and sell gas to the inhabitants of the city and desired to secure a supply of gas for this purpose, the Dominion Company undertook to lay an eight-inch pipe from its gas belt to points within the city and deliver gas to the United Company by November 1, 1905. The period of endurance of the agreement was 19 years, to correspond with the endurance of the United Company's franchise. The Dominion Company thereby agreed to " use due diligence in supplying [the United Company] with a constant and adequate supply of dry natural gas for all consumers it may secure in the corporate limits of the said city of Hamilton as the said limits now exist or may hereafter be established by law."

As the result of these statutes, by-laws and agreements the Dominion Company and the United Company, before the

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annexations by the city of Hamilton, stood in this position—namely, that the Dominion Company was supplying and distributing gas in the township of Barton under the Barton by-law No. 533, while the United Company was supplying and distributing in the city of Hamilton, under the Hamilton by-law No. 400, gas which it purchased from the Dominion Company under the agreement of September 25, 1905. As already explained, notwithstanding the series of annexations by the city of portions of the township, which began in 1908, no serious question seems for many years to have arisen as to the position of the Dominion Company in relation to the areas transferred from Barton to Hamilton. Nor does any question seem to have arisen between the Dominion Company and the United Company under their agreement of September 25, 1905, although the Dominion Company thereby undertook to supply the United Company with gas for all consumers it might secure within the city of Hamilton not only as the city limits then existed but as they might "hereafter be established by law," a stipulation which in the circumstances might conceivably have led to difficulties. Apparently both companies in some instances had laid their pipes and were supplying gas in the same streets. A policy of extension and intensified competition initiated by the Dominion Company in 1928 or 1929 in the annexed areas seems to have brought about the dispute which led to the present proceedings.

These arose in this fashion. On March 24, 1931, the United Company, whose franchise from the city of Hamilton under the original by-law No. 400 and relative agreement had meantime been continued, entered into a new agreement with the city, whereby, in consideration of a reduction in the price of gas, there was granted to it by the corporation for a period of ten years "an exclusive franchise . . . . to conduct, distribute and supply and sell gas in the city of Hamilton and for such purpose to enter upon all streets . . . . now or at any other time hereafter within the jurisdiction of the council." This grant was expressly stated to be subject to the exception of "any existing rights and privileges that may now be held by the Dominion Natural Gas Company, Ld.

under by-law No. 533 of the township of Barton and the agreement entered into pursuant to the said by-law." By the second article of this new agreement the city corporation undertook for ten years not to grant any gas franchise to any company other than the United Company and authorized the United Company to take proceedings against, among others, the Dominion Company for the purpose (inter alia) of determining whether the latter had any existing rights or privileges justifying it in supplying or selling gas within the city, all the rights of the city corporation in the premises being assigned to the United Company. The execution of this new agreement was authorized by by-law No. 4168 of the City of Hamilton but it was declared that it should not be effective until the legislature of the Province of Ontario should have enacted a statute confirming and ratifying it and conferring upon the United Company the right to take all action contemplated by the second article of the agreement. On April 2, 1931, the requisite statute was passed (1931 statutes of Ontario, 21 Geo. 5, c. 100) confirming the agreement and declaring it to be legal, valid and binding. By s. 4, sub-s. 2, the United Company was authorized to take in its own name or in that of the corporation of the city the proceedings contemplated in the agreement, such action to be at the United Company's own expense.

The way being thus cleared, the United Company, associating the city corporation with it as a plaintiff, initiated the present action against the Dominion Company. The writ claimed (1.) a declaration that the Dominion Company was wrongfully maintaining its mains in the streets of the city and wrongfully supplying gas to the inhabitants of the city, (2.) an injunction restraining the Dominion Company from continuing so to use the streets of the city and from continuing to supply gas to the inhabitants; (3.) a mandatory order requiring the Dominion Company to remove its mains from the streets of the city; and (4.) damages.

The United Company was within its rights in joining the city corporation as a plaintiff. The city, however, has taken no active part in the action, regarding the controversy as one

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between the two gas companies, as indeed it is, although the city corporation might have been expected to show some concern for the citizens whose present gas supply from the Dominion Company the United Company seeks to stop. This may be counterbalanced by the consideration that the United Company, under the agreement of March 24, 1931, undertook to lower their charges for gas. At any rate the mayor candidly stated in evidence that he had no notice of the action until he read of it in the newspaper.

The claims advanced by the United Company are formidable. If sustained they would entail the removal of all the Dominion Company's mains and pipes in the annexed areas, both those which it lawfully laid in these areas before annexation and those which it subsequently laid, in many cases under permits granted by the city engineer, and the complete annihilation, without any compensation, of its undertaking so far as situated and operating in the annexed areas. The fate of the consumers in the annexed areas who at present are supplied by the Dominion Company, some of them at the express request of the plaintiff corporation, is ignored. It would be remarkable, to say the least of it, if the mere transference of an area from the administration of one local authority to that of another were to be attended by consequences so disastrous to a public utility undertaking operating in the transferred area. It would also, so far as their Lordships are aware, be unprecedented.

The United Company's arguments, however, were well arrayed, and although they failed to convince either the trial judge or the Court of Appeal of Ontario, who both dismissed the action, they merit and have received careful reconsideration by their Lordships.

The Dominion Company's position was assailed by the United Company from various points of attack. In the first place it was argued that on construction such rights as were conferred on the Dominion Company by the Barton by-law No. 533 and relative agreement were confined to the township of Barton as its limits might from time to time be fixed, and that the geographical extent of the Dominion Company's rights was accordingly progressively abridged as Barton lost territory to Hamilton. In other words, the by-law applied only to such areas as were within, and only to those areas so long as they were within, the township of Barton and subject to its government. In support of this construction, attention was drawn to numerous provisions in the by-law—for example, that works executed by the Dominion Company were to be done to the satisfaction of the township corporation; that permits for opening the streets were to be obtained from the township corporation; and that the township corporation was entitled to appoint an inspector to supervise any street openings. Attention was particularly drawn to the price-fixing provisions in the by-law which instituted a comparison with the price charged in the city of Hamilton. These and other provisions it was urged could not receive effect according to their terms after annexation, so far as regards the annexed areas, and clearly showed that the by-law intended that the Dominion Company should operate only within the municipal boundaries of Barton. Their Lordships do not accept this argument. The by-law confers rights on the Dominion Company in the township of Barton and, nothing being said as to future alterations of the township, the natural reading is that the by-law applies to the township as it existed at the date of the by-law. By the Ontario Municipal Act a municipality is defined as "a locality, the inhabitants of which are incorporated." When the by-law refers to the township of Barton as defining the scope of the privileges which the by-law confers their Lordships construe this as referring to the locality embraced in the township at the date of the by-law. The argument from the inapplicability of the detailed provisions of the by-law after annexation might be impressive were it not for the fact, as will be seen in the sequel, that the legislature of Ontario certainly contemplates in some cases the continued operation of franchises after annexation, although doubtless in most cases containing similar local provisions. If a franchise is to continue valid after the transfer of the area to which it relates from one local administration to another then its terms must manifestly be adapted to the change and be applied mutatis mutandis. The process occasioned no practical difficulty in the present case, as has already been shown. The argument on the construction of the by-law therefore fails.

Then the validity of the by-law is next attacked. It was argued that the Dominion Company did not in 1904 obtain any franchise from Barton, but merely an agreement such as is contemplated in s. 3 of c. 200 of the R. S. Ont., 1897 (quoted above in part in the third paragraph of this judgment), giving it power only to open up streets and lay pipes. This s. 3 was repealed by c. 34 of the statutes of Ontario, 1907, Edw. 7, and with this repeal the powers of the Dominion Company, it was said, came to an end. There are several answers to this. That the Barton by-law and relative agreement conferred what is correctly designated a " franchise " on the Dominion Company is reasonably clear. The rights so conferred are referred to by the plaintiff corporation as " franchise rights " and the rights conferred in very similar terms on the United Company by the plaintiff corporation by by-law No. 400 in 1904, are also described as a " franchise " in the agreement of 1905 between the Dominion Company and the United Company. In c. 42 of the statutes of Ontario, 1912, 2 Geo. 5, which is entitled " an Act respecting the granting of franchises by municipal councils," the term " franchises " is defined to " include any right or privilege to which this Act applies," and the Act expressly deals with rights of occupation of highways by gas and other public utility undertakers. In Canadian local government law the term is not used with the technical signification which it possesses in other connections, but is employed so as to include just such rights and privileges as those with which this case is concerned.

As regards the repeal of s. 3 by the subsequent statute of 1907, that statute by s. 211, sub-s. 1, saves any by-law made under any enactment thereby repealed, and if this saving, as may be the case, does not cover a municipal by-law such as is here in question, then s. 46 of the Interpretation Act sufficiently protects the Dominion Company rights, providing as it does that no repeal of an Act is to affect any right or privilege acquired under the Act repealed. Finally, in their Lordships' view, the source from which the Barton by-law derived its authority and the Dominion Company its powers is not the repealed s. 3 of c. 100, R. S. Ont., 1897, but s. 566, sub-s. 3, of the Consolidated Municipal Act, 1903, quoted above. The statute of 1897 is a Companies Act not a local government act ; it sets out what a company if otherwise duly authorized may lawfully do, but does not authorize a municipality to confer any power on the company. The United Company's attack on the validity of the Barton by-law, therefore, also fails.

It was next argued that the Dominion Company could not lawfully supply gas in Hamilton without a by-law of the Council of the city authorizing it to do so, and that, as there was admittedly no such by-law, the Dominion Company was disabled from supplying gas within the city. Reference was made to the requirements of various statutes on the subject, and among others to c. 75 of the statutes of Ontario, 1909, 9 Edw. 7, and c. 42 of the statutes of Ontario, 1912, 2 Geo. 5. The latter of these two statutes, which repeals and re-enacts the former, provides in s. 2 that the council of a municipality shall not grant to any company the right to use or occupy any of the highways or to construct or operate any public utility in the municipality unless and until a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted has been assented to by the electors of the municipality. But the Dominion Company's claim to supply gas in Hamilton is founded on the Barton by-law (which was passed before the enactment of the statute just mentioned) and on that by-law having become binding on the council of the city as regards the annexed areas. The argument of the United Company would preclude the exercise of any public utility franchise after the annexation of the area to which it is applicable unless a fresh by-law was passed by the annexing authority and assented to by the electors. If after annexation the Dominion Company's Barton by-law remained effective and became binding on the city of Hamilton as regards the annexed areas—a point still to be dealt with by their Lordships—then, in their Lordships' opinion it was not necessary, in order to enable the Dominion Company to continue to exercise its franchise in the annexed areas, that the council of the city of Hamilton should pass and obtain the assent of the electors to a by-law empowering the Dominion Company to supply gas in the annexed areas.

On yet another ground the Dominion Company's powers were challenged by the United Company. It will be recalled that the Barton by-law No. 533, by its second article provided that the Dominion Company should not be entitled to enter upon or lay their mains and pipes in any other highways of the township of Barton until they had first laid the mains and pipes in certain highways mentioned in the first article of the by-law. The United Company maintained that the Dominion Company had failed to prove that it had performed this condition precedent to the exercise of the powers conferred by the by-law as regards the highways other than those specified. There was some discussion as to the onus of proof in this matter, but their Lordships are prepared to take it that one at any rate of the mains specified in the first article of the by-law was not laid before the Dominion Company proceeded to enter upon and lay their mains in other highways. On the other hand, it was not disputed that all the mains specified in the first article of the by-law have now been laid in the highways mentioned. That being so, it is not, in their Lordships' opinion, now open to the United Company to seek to defeat the Dominion Company's rights by founding upon what was at most a breach of the contractual programme prescribed by the township of Barton for the Dominion Company's operations, which breach has since been remedied without objection, either by the Barton or by the Hamilton municipality.

The Lordships, having traversed these various arguments submitted on the construction and validity of the Barton by-law No. 533, now pass to the consideration of what is really the cardinal question in this appeal—namely, the effect of the Hamilton annexations on the Barton by-law. On the one hand it was submitted that the legal result of annexation

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was to abrogate the Barton by-law so far as regards the annexed areas ; on the other hand, it was submitted that after annexation the by-law remained effective as regards the annexed areas, and that the rights and liabilities of the parties under it remained as before, except that, as regards the annexed areas the rights and liabilities of the municipality of Barton passed to the municipality of Hamilton.

The legislation of Ontario relating to the annexation of administrative areas is expressed in very general terms, and does not deal in any detail with the consequential results of the transference of an area from one local administration to another as affecting public utility services in the area or, indeed, many other important matters of local concern. In 1908, when the first of the annexations in question took place, the Consolidated Municipal Act, 1903 (c. 19 of the statutes of Ontario, 1903, 3 Edw. 7), was in force.

Sect. 24, sub-s. 1, of that statute, as altered by the Municipal Amendment Act, 1906 (c. 34 of the statutes of Ontario, 6 Edw. 7), and added to by the Municipal Amendment Act, 1908 (c. 48 of the statutes of Ontario, 8 Edw. 7), reads as follows : " 24—(1.) In case the council of any city or town by resolution declare that it is expedient that any portion of an adjacent township should be annexed to the city or town and in case the majority of the ratepayers in any such portion of such township petition the Lieutenant-Governor in Council to add such portion to such city or town, and after due notice of such resolution and petition has been given by such city or town to such adjacent township, the Lieutenant-Governor may by proclamation, to take effect on some day to be named therein, annex to the city or town such portion of the adjacent township upon such terms and conditions as to taxation, assessment, improvements or otherwise as may have been agreed upon or shall be determined by the Lieutenant-General in Council."

Sect. 56 is in the following terms : " 56. In case an addition is made to the limits of any municipality the by-laws of the municipality shall extend to the additional limits and the by-laws of the municipality from which the same has been detached shall cease to apply to the addition except only by-laws relating to roads and streets and these shall remain in force until repealed by by-laws of the municipality to which the addition has been made."

By the Railway and Municipal Board Act, 1906 (c. 31 of the statutes of Ontario, 6 Edw. 7), s. 53, the powers of the Lieutenant-Governor in this matter became exerciseable by that Board, and each of the annexations with which this appeal is concerned was effected by an order of the Board. These orders state the terms and conditions of the respective annexations in detail, and deal with the adjustment of debt, cost of improvements and so forth, but so far as their Lordships' attention has been drawn to them they do not deal with existing by-laws or franchises in any instance before the orders of September 11, 1928, and February 28, 1929, in each of which there is an article vesting in the corporation of the city of Hamilton all right, title and interest of the township of Barton in the highways and streets in the annexed area, and all right, title and interest in any franchises or agreements heretofore given or made respecting these highways and streets. Incidentally, it may be noticed that the Board evidently did not regard the continued operation of a franchise after annexation as presenting any practical difficulty. The new local authority was merely to be substituted for the original local authority.

Under s. 56 of the Act of 1903 just quoted, the by-laws of the municipality of Barton, it will be observed, ceased to apply to areas annexed to Hamilton, except only by-laws relating to roads and streets, which were to remain in force until repealed by by-laws of Hamilton. The question is whether this enactment is applicable to the Barton by-law No. 533 and had the effect of abrogating it so far as regards the areas annexed to Hamilton. Their Lordships have reached the conclusion that the by-laws which the statute was intended to affect are the general administrative by-laws of the municipality, and that by-laws of a contractual character conferring franchises on particular individuals or companies do not, on a sound construction, come within the enactment at all. Were it otherwise, all the franchise by-laws of Hamilton would, on annexation, automatically apply to the annexed areas, even although by their terms they might be strictly confined to the city's limits as at the date of grant. The immediately preceding s. 55 indicates that there are different kinds of by-laws for it distinguishes between those which a municipal council can, and those which it cannot, legally repeal. The by-law which the Dominion Company procured from the municipality of Barton was followed and made effectual by an agreement between the parties, and it would be strange if the by-law were to be abrogated as regards the annexed areas, and yet the agreement were to stand, and equally strange if the agreement were held to be consequentially abrogated, although the enactment says nothing about such agreement. The effect of annexation is to transfer an area from one local government jurisdiction to another, and it is appropriate that after annexation, the annexed area should cease to be subject to the regulations of the municipality which it has quitted, and become subject to the regulations of the municipality which it has joined. But it would require very clear language to abrogate on annexation, without compensation, all the contractual engagements applicable to the transferred area which happened to have been authorized by by-laws. It was suggested that the by-law might be saved as falling within the exception of by-laws relating to roads and streets, but here again an indication is given of the kind of by-laws contemplated by the enactment; the by-laws relating to roads and streets are to remain in force until repealed by by-laws of the annexing municipality. Plainly this refers to general administrative by-laws relating to roads and streets which may be altered from time to time. Existing by-laws relating to roads and streets are continued in force till the annexing municipality repeals them and substitutes its own by-laws. In their Lordships' opinion the Barton by-law No. 533 is not a repealable by-law of this character, and is not a by-law within the meaning of either the rule or the exception in s. 56. This is also the view of the learned Chief Justice of Ontario and his colleagues, with whom their Lordships find themselves on this point in entire agreement.

The legislation on the matter remained as above quoted until 1913, when the Municipal Act of that year was passed (statutes of Ontario, 3—4 Geo. 5, c. 43), and provided as follows: " 33. Where a district or a municipality is annexed to a municipality its by-laws shall extend to such district or annexed municipality and the by-laws in force therein shall cease to apply to it, except those relating to highways, which shall remain in force until repealed by the council of the municipality to which the district or municipality is annexed and except by-laws conferring rights, privileges, franchises, immunities or exemptions which could not have been lawfully repealed by the council which passed them."

The subsequent annexations were governed by this enactment. Its terms are instructive. For one thing it recognizes the distinction which their Lordships and the Court of Appeal have drawn between general administrative by-laws and by-laws which confer privileges on particular persons. It also recognizes that there are by-laws of such a character that they cannot lawfully be repealed, notwithstanding the general statutory power possessed by municipalities to repeal, alter and amend their by-laws. If it be suggested that the introduction in the enactment of 1913 of words saving franchise by-laws from repeal on annexation implies that such by-laws fell within the repealing words in the previous legislation, the answer is to be found in s. 51 of the Interpretation Act, 1907 (statute of Ontario, 7 Edw. 7, c. 2), which reads as follows: " 51. The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was or was considered by the Legislature to have been different from the law as it has become under such Act as so amended."

In their Lordships' opinion the enactment of 1913 in saving franchise by-laws from repeal on annexation merely declared and made explicit an exception which was implicit, on a sound construction, in the previous legislation.

Numerous cases were cited in the course of the argument, but their Lordships do not find it necessary to discuss them. They turned to a large extent on the terms of special statutes

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and agreements and only incidental passages had any bearing on the present case. Such passages so far as they go tend to support the view which has commended itself to their Lordships in disposing of the present problem.

It remains to add that their Lordships do not think that any distinction should be drawn or can logically be drawn between mains and pipes of the Dominion Company which were laid in the annexed areas before annexation and those which have been laid in these areas after annexation. Nor do they regard the Dominion Company's franchise as limited to the use of highways in existence or already occupied by them at the time of annexation. The franchise is available to the Dominion Company alike in the portions of their original area which remain in Barton and in the portions which have now been incorporated in Hamilton and in both the franchise extends to all highways whenever formed. On these points also their Lordships find themselves in agreement with the views of the learned judges of the Court of Appeal.

The result is that in their Lordships' opinion the Barton by-law No. 533 and relative agreement conferred upon the Dominion Company a valid and perpetual franchise, not subject to repeal, which on a sound construction applied to the whole geographical territory which at the date of the by-law was comprised in the township of Barton; that on the annexation by the city of Hamilton of various areas forming parts of that territory the franchise remained effective in and applicable to these annexed areas; and that in the annexed areas the municipality of Hamilton after annexation took the place mutatis mutandis of the municipality of Barton to all intents and purposes as regards the rights and obligations created by the by-law and relative agreement.

Their Lordships will accordingly humbly advise His Majesty that the order of the Court of Appeal for Ontario of April 24, 1933, be affirmed and the present appeal be dismissed. The Dominion Company will have its costs of the appeal.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

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NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED . . . . . . APPELLANTS;

AND

WM. H. PRICE, LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*New South Wales—Insurance (Marine)—Money paid under mistake of fact—Abandonment—Notice of Abandonment—Marine Insurance Act,* 1909 (*No.* 11 *of* 1909; *Commonwealth*), *s.* 68, *sub-s.* 6.

Lemons were shipped from Messina to Sydney and insured under a policy of marine insurance. Believing from information received in Sydney that the lemons had been damaged by a peril insured against and sold in consequence, the insurers paid the insured value to the insured, who signed a document by which they agreed to transfer and abandon to the insurers the goods and their proceeds. It was ascertained later that the lemons had not been so damaged, but had been sold because they were found to be ripening. By the (Commonwealth) Marine Insurance Act, 1909, s. 68, sub-s. 6—which is identical with s. 62, sub-s. 6 of the (English) Marine Insurance Act, 1906—" Where notice of abandonment is accepted, the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice ":—

*Held*, that the insurers could recover the sum paid by them as money paid under a mistake of fact; the document above mentioned, having regard to its terms and the fact that it was given after the lemons had been sold, was not a notice of abandonment within s. 68, sub-s. 6, of the Act.

*Semble*, that notice of abandonment, or its acceptance, given under a material mistake of fact is a nullity.

Judgment of the Supreme Court of New South Wales, 33 S. R. (N. S. W.) 196, reversed.

APPEAL (No. 80 of 1933) from a judgment of the Full Court of the Supreme Court of New South Wales (March 31, 1933) affirming a judgment of a judge of that Court.

The appellant insurance company brought an action in the Supreme Court of New South Wales against the respondents to recover 453*l*. 11*s*. 3*d*. paid to them under a policy of marine

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* *Present:* VISCOUNT SANKEY L.C., LORD BLANESBURGH, LORD WRIGHT, SIR LANCELOT SANDERSON, and SIR SIDNEY ROWLATT.

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insurance, the claim being based upon the ground that the payment had been made under a mistake of fact. The main question upon the appeal was whether, assuming that the payment was made under a mistake of fact, the appellants were debarred from recovering by the (Commonwealth) Marine Insurance Act, 1909, s. 68, sub-s. 6. That sub-section—like the (English) Marine Insurance Act, s. 62, sub-s. 6, provides—" Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice."

The facts appear from the judgment of the Judicial Committee.

Reference was made in the argument to the following conditions of the policy, as translated from the Italian :—

" 25. The abandonment can only be made in the following circumstances . . . . (c) in case of the sale of the insured goods in a place other than at destination, owing to material damage due to shipwreck, stranding, collision or fire.

" 26. The abandonment, when justified according to the preceding paragraph, must be notified to the underwriters within 60 days, under penalty of loss of rights."

The trial judge (Halse Rogers J.) held that the appellants were entitled to recover so far as the common law was concerned, but that the provisions of s. 68 of the Act were conclusive against their right to do so.

An appeal to the Full Court was dismissed. Street C.J., with whom James J. concurred, was of opinion that the view of the trial judge upon both points was right. Davidson J. was of opinion that as the sale of the lemons had taken place before the settlement by the appellants the loss was not a constructive total loss, and s. 68 of the Act did not apply. He held, however, that the mistake was not material to the payment, because on the known facts the sale had been on account of delay and not damage, so that under s. 61 of the Act there was no liability to pay. The appeal is reported at 33 S. R. (N. S. W.) 196.

1934. April 12. *W. L. McNair* for the appellants. Unless the appellants are debarred by s. 68, sub-s. 6, of the Act they are entitled to recover for money paid under a mistake of fact: *Kelly* v. *Solari* (1), *Home & Colonial Insurance Co.* v. *London Guarantee & Accident Co.* (2) Sect. 68 did not apply. That section, like the two preceding sections, related to constructive total loss. The document of March 25, 1928, was not, and was not intended to be, a notice of abandonment; it merely recorded in a formal manner results which would follow under s. 85 of the Act, and under the policy, upon payment of a valid claim for a total loss. The distinction between an abandonment and a notice of abandonment was pointed out by Lord Blackburn in *Rankin* v. *Potter* (3) and by Brett L.J. in *Kaltenbach* v. *Mackenzie.* (4) The terms of the document show that it was an abandonment or subrogation upon payment of a total loss; further, as the lemons had already been sold there could not be a notice of abandonment. Further, it is submitted that a notice of abandonment, or its acceptance, given under mistake as to the material facts is not operative: *Lloyd's* v. *Dominion Film Co., Ld.* (5)

*Wilfrid Barton* for the respondents. There was a notice of abandonment and its acceptance within the meaning of s. 68, sub-s. 6, of the Act, and therefore a conclusive admission of liability which precluded the claim. On the information before the parties in Sydney they regarded the matter as a constructive total loss. By s. 68, sub-s. 2, of the Act a notice of abandonment may be given verbally. It is to be inferred that before the payment was made notice was so given and accepted. A notice of abandonment may be given although a sale has already taken place: *Kaltenbach* v. *Mackenzie.* (4) Under conditions 25 and 26 of the policy the respondents, upon the supposed facts, were both entitled and bound to notify an abandonment. The abandonment notified and accepted by the document was one to which s. 68, sub-s. 6, applied, even if the supposed loss was not a constructive total loss. Having regard to its express terms that provision applies even where the notice of abandonment or its acceptance has been induced by a mistake as to the facts. Difficulties would arise if it were otherwise.

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(1) (1841) 9 M. & W. 54.
(2) (1928) 45 Times L. R. 134.
(3) (1873) L. R. 6 H. L. 83, 113.
(4) (1878) 3 C. P. D. 467, 470.
(5) [1922] N. Z. L. R. 600.

*W. L. McNair* in reply referred to *Cossman* v. *West*. (1)

May 8. The judgment of their Lordships was delivered by

Lord Wright. The appellants, an English insurance company with branches in many parts of the world, including (amongst other places) Messina and Sydney, New South Wales, brought the action out of which this appeal arises, against the respondents, a company trading as produce brokers in Sydney for the return, as money paid under a mistake of fact, of 453*l.* 11*s.* 3*d.* That sum had been paid to the respondents by the appellants on the footing of a loss having occurred under a policy of marine insurance dated December 11, 1928. The policy had been issued by the appellants' branch at Messina to the shippers of 600 bushels of lemons on the steamship *Aagtekerk*, and insured the lemons on the voyage from Messina to Sydney, New South Wales. The insurance was against the usual perils, including sea perils, and was f.p.a., unless in respect of damage caused by fire, sinking, collision, or stranding. The lemons were shipped at Messina in December, 1928, and the steamship proceeded on her voyage; at Smyrna, when entering the port, she struck a submerged object: the cargo stowed in No. 1 hold was damaged by sea water, but the lemons, being stowed in No. 2 hold, were undamaged. The steamship then went on to Gibraltar, where the surveyors ordered her to go to Holland for repairs, the cargo being either transhipped or disposed of at Gibraltar. The lemons were reported to be ripening and fit to be marketed "in about 14 days (limit)" and were sold for that reason about February 5, 1929, by the shipowners or their agents in Gibraltar, at the best price obtainable locally. They were not damaged by any peril insured against; the sale was solely because of their condition.

It is clear on these facts that the respondents, who became, in due course, holders of the policy and endorsees of the bill of lading, had no claim on the policy; any claim they might have could only be against the shipowners for failure to deliver in accordance with the bill of lading or against the shippers for shipping goods inherently unfit for transport on the voyage.

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(1) (1887) 13 App. Cas. 160, 175.

The true state of facts was not, however, known either to the appellants or the respondents in Sydney until some time after March 25, 1929, the date when the payment in question was made in the circumstances now to be stated. The only information possessed in Sydney up to that date was derived from two documents: (1.) a cable from the shippers to the respondents, produced by the respondents to the appellants about January 28, 1929, in the following terms: "*Aagtekerk* sailed nineteenth December had collision goods transhipped steamer *Arendskerk* laying Gibraltar act against Norwich Union Insurance for damage"; (2.) a document called a short-landed certificate dated March 12, 1929, issued by the shipowners' Sydney branch to the respondents and produced by the respondents to the appellants, which was in the following terms:

"S.S. AAGTEKERK.

We beg to advise that the 600 cases lemons consigned to you from Messina, and which were loaded by the above steamer, have been returned to Rotterdam for disposal. As you are no doubt aware the *Aagtekerk* struck a submerged rock in Smyrna Bay, which necessitated her returning to Rotterdam for repairs, and the delay caused by this forced us to dispose of the lemons at that port.

Yours faithfully,

HOLLAND AUSTRALIA LINE."

On the faith of these documents, the appellants paid the respondents 453*l.* 11*s.* 3*d.* on March 25, 1929, taking the following letter from the respondents:

"Sydney.

To the
Norwich Union Fire Insurance Society Ld.

In consideration of your agreeing to pay the sum of four hundred and fifty-three pounds 11/3*d.* under policy of insurance No. N 602 effected with you on the property mentioned in the schedule hereto we hereby agree to assign transfer and abandon to you all right title and interest in and to the said property and the proceeds thereof and all that can or may be made saved or realised from the damage or loss reported to have occurred to the said property and all rights against the owners of the other cargo on board any vessel or other person whatsoever caused or arising by reason of the said damage or loss and to grant you full power to take and use all lawful ways and means in our or your name or otherwise—at your risk and expense—to save and realise the said property or its proceeds and hereby agree to subrogate you to the same rights as we have in consequence of or arising from the said loss or damage.

And we hereby undertake and agree to make and execute at your expense all such further deeds assignments and documents and to render such assistance as you may reasonably require for the purpose of carrying out this arrangement.

As witness our hands this twenty-fifth day of March, 1929.

SCHEDULE OF PROPERTY.

As per Bill of Lading and Invoice per *Aagtekerk* bound from Messina to Sydney.

| Witness | Signature |
|---|---|
| JOHN B. FERGUSON. | WM. H. PRICE LTD. |
| | W. H. PRICE, Director.” |

Some time afterwards, the appellants were first informed that the lemons had not been damaged by any peril insured against and discovered for the first time that they had made the payment under a mistake of fact. A claim was made for the return of the money, and when the return was refused, this action was brought.

It was ordered in the action that there should first be tried the question whether, on the assumption that the payment was made under a mistake of fact, the moneys paid were recoverable. The Chief Justice stated in his judgment that when the appellants made their agreement of March 25, 1929, there is no doubt they believed that the lemons had been damaged by the collision ; he added : “I have no doubt, too, that the defendant was under the same belief." It is not necessary here to consider whether in any subsequent proceeding in this case the respondents will be able to impugn this position. The present proceeding is based on that assumption. The Chief Justice went on to say: "It is clear that the payment of the insurance moneys in consideration of the defendant's agreement to abandon its right to its property and its subrogation of those rights to the plaintiff was based on an underlying assumption by both parties that the lemons had been damaged by a peril insured against, that is, by collision with some submerged object." The Chief Justice accordingly held that at common law the appellants would be entitled to recover as for a payment made under a mistake of fact; but he held that, notwithstanding, the appellants were debarred from recovering because there had been a notice of abandonment given and accepted within the meaning of s. 6, sub-s. 6, of the Australian Marine Insurance Act, 1909, so that a conclusive admission of liability for the loss was constituted as against the appellants. James J. agreed with the Chief Justice; the decision of the trial judge had been to the same effect, and was accordingly affirmed. Davidson J. in the Full Court reached the same conclusion as his colleagues, but for other reasons; he did not agree that the claim was barred by the provisions of the Marine Insurance Act, but he held that the mistake was one of law.

Their Lordships agree with the trial judge and with the majority of the Full Court that for purposes of this appeal the mistake was one of fact and was fundamental to the transaction. On the assumptions on which this appeal proceeds, the misconception under which the payment was made was that there had been a loss by perils insured against; unless that were so, there was no liability under the policy: save for that misconception no payment could have been claimed and no payment would have been made. The facts which were misconceived were those which were essential to liability and were of such a nature that on well-established principles any agreement concluded under such mistake was void in law, so that any payment made under such mistake was recoverable. The mistake, being of the character that it was, prevented there being that intention which the common law regards as essential to the making of an agreement or the transfer of money or property. Thus, in *Kelly* v. *Solari* (1), where money was paid under a mistake of fact, Baron Parke concludes his well-known statement of the law with these words: "If it (the money) is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it." The "fact" which Baron Parke is referring to is one "which would entitle the other to the money" if true. The reference to intention is crucial. In the same sense, in *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (2), Lord Sumner says of *Kelly* v. *Solari* (3): "The executrix of Solari ought to have known, and probably did, that the company had cancelled the policy and was making a mistake in paying again. If so, there was no real intention on the company's part to enrich her." Lord Sumner had just pointed out that passing of property is a question of intention, and just as much so in the case of a payment of money as in the transfer of a chattel. To the same effect, Lord Shaw in the same case says in respect of mistakes: "The true facts may not have been known to the grantor, or may have been misrepresented with such a result that the mind of the grantor does not go with the transaction at all; his mind goes with another transaction, and he is meaning to give effect to that other transaction, depending on facts different from those which were the true facts." Thus, in the present case the only transaction with which the mind of the appellants went was payment of a claim on the basis of the truth of facts which constituted a loss by perils insured against: they never intended to pay on the basis of facts inconsistent with any such loss by perils insured against. The mistake was as vital as that in *Cooper* v. *Phibbs* (4) in respect of which Lord Westbury used these words: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell* v. *Lever Bros., Ld.* (1)

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(1) 9 M. & W. 54.

(2) [1926] A. C. 670, 696.

(3) [1926] A. C. 690, 696.

(4) (1867) L. R. 2 H. L. 149, 170.

It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic. Whether the mistake does satisfy this description may often be a matter of great difficulty. Applying these principles to the present case, their Lordships find themselves so far in agreement with the opinions of the Courts below that the money paid is recoverable at common law. That leaves for consideration the point on which the decision went against the appellants, so that this appeal is brought.

It is first necessary to determine precisely what was the transaction of March 25, 1929, the nature of which must be ascertained from the document of that date. The Court below have held that it either constituted or evidenced a notice of abandonment as for a constructive total loss and an acceptance of that notice.

It was agreed before this Board that the rights between the parties must be ascertained in accordance with the municipal law of Australia, including the provisions of the Marine Insurance Act, 1909. That Act corresponds in substance with the English Marine Insurance Act, 1906: thus s. 4 of the former Act says that the rules of the common law, including the law merchant, save in so far as they are not inconsistent with the express provisions of the Act, shall apply to contracts of marine insurance: this section is identical with s. 91, sub-s. 2, of the latter Act. Similarly ss. 62, 63, 66 and 67 of the Australian Act, correspond with ss. 56, 57, 60 and 61 of the English Act, and define partial and total loss and actual and constructive total loss in identical terms: s. 68 of the former Act which deals with notice of abandonment is identical with s. 62 of the English Act. The policy, which was in Italian, did indeed contain special terms as to abandonment, but they are not material in this case.

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(1) [1932] A. C. 161.

Their Lordships cannot find in the document of March 25, 1929, any justification for reading it as a notice of abandonment or as an acceptance of such a notice or as dealing at all with a case of a constructive total loss. In their judgment, the document embodies an agreement for the immediate settlement on the basis of an actual total loss—together with the consequent abandonment to the appellants, upon payment of the amount of the total loss, of all rights or property surviving in respect of the loss. That this is its true meaning, follows both from the actual language of the document and the circumstances of the case as conceived by the parties. The information on which they acted was that the lemons had been actually sold; the lemons had thus passed from the actual control and possession of the respondents, which had lost them irretrievably. There was thus an actual total loss within the definition in s. 63 of the Act: no notice of abandonment need in such a case be given: indeed there could not be a notice of abandonment within s. 68, sub-s. 1, because that section only applies to an election to abandon the subject-matter insured to the insurer, whereas, the lemons having been sold, there was nothing that the respondents could abandon. All their right of property in the lemons had gone; it is not even clear that the lemons existed at all, since in all human probability they had been already consumed. The lemons had been sold, it seems, by the shipmaster or his agents, acting as agents of necessity: the sale was not the result of any sea damage or peril insured against affecting the lemons, but of their inherent vice or of delay: the sale, unless justifiable in consequence of perils insured against, gave no claim against the appellants: it could not on any view constitute a constructive total loss. The document in question is no doubt a usual form for purposes of subrogation, commonly used on payment of an actual total loss. The relevant words are transfer and abandon: they cannot be construed as involving notice of a claim to abandon which the appellants as underwriters were required to accept so that thereby there should be a constructive total loss. In *Rankin* v. *Potter* (1) Lord Chelmsford points out that "abandonment" and "notice of abandonment" are two separate and distinct things, though they are frequently confounded together in expression. The same distinction is developed by Brett L.J. in *Kaltenbach* v. *Mackenzie* (2): he points out that abandonment is part of every contract of indemnity, whereas notice of abandonment is peculiar to marine insurance, just as constructive total loss (as distinguished from actual total loss) is also peculiar. As an instance of abandonment he cites the well-known case of *Roux* v. *Salvador* (3); that case shows, he says, that where goods had been totally lost, but something had been produced by the loss, which would not be the goods themselves, if it were of any value at all, it must be abandoned. Brett L.J. adds: "But that abandonment takes place at the time of the settlement of the claim: it need not take place before."

In their Lordships' judgment, these latter words exactly describe the transaction between these parties which was recorded in the document of March 25, 1929. The parties having been informed that the lemons had been sold owing to delay and coupling that information with the previous cable which they understood to state that the lemons had been damaged as a consequence of the collision, not unnaturally understood the position as being that of a justifiable sale consequent on damage due to perils insured against and

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(1) L. R. 6 H. L. 83, 155.
(2) 3 C. P. D. 467.
(3) (1836) 3 Bing. N. C. 266.

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accordingly settled there and then as for an actual total loss, the appellants being subrogated to the proceeds of the sale.

On this footing and on the assumption that the parties acted under a mistake of fact, or that the payment was made by the appellants under a mistake of fact, there can, in their Lordships' judgment, be nothing in the Marine Insurance Act which affects the application of the common law rule laid down in *Kelly* v. *Solari*. (1) It therefore becomes unnecessary to consider the question so fully discussed in the judgments below as to the construction and effect of s. 68, sub-s. 6, of the Act. Their Lordships will only briefly point out with all respect that there may be other matters to be considered than the bare words of the sub-section. No doubt it is not generally permissible in construing the words of the Act to read in conditions and qualifications which are not expressed; and s. 4 only permits the application of the rules of the common law and the law merchant so far as not inconsistent with the express provisions of the Act. But the operative effect of mistake or fraud or duress, in cases where it operates, is not inconsistent with the express words (to take the relevant instance) of s. 68, sub-s. 6, because mistake, if established, raises a preliminary or prior question—namely, whether there is in law a notice of abandonment at all, or an acceptance of such notice; indeed s. 68, sub-s. 6, presupposes something which is not only in form but in reality a notice of abandonment or an acceptance thereof. Thus, if what appears to be the notice or acceptance is void and a nullity, the express words of s. 68, sub-s. 6, do not apply at all. Long ago, when communications were slow and difficult, the position of a notice of abandonment based on false intelligence was considered. That admirable writer on insurance law, Phillips, at s. 1665 of his work, states: "Although an abandonment may be made on true intelligence of a total loss, yet if the intelligence proves to be false the abandonment will be a nullity." In *Bainbridge* v. *Neilson* (2) Lord Ellenborough C.J. said: "The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain

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(1) 9 M. & W. 54.

(2) (1808) 10 East, 329, 341.

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supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment: but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, . . . ."

It would seem that a notice of abandonment which is itself a nullity cannot become the basis of rights simply because abandonment has been accepted by the underwriters. It further seems that on general principles mutual mistake will have the same effect in regard to the offer and acceptance of abandonment as in regard to any other contract.

It is unnecessary to repeat what has been said earlier in this judgment as to the effect of mistake, but it seems to follow that just as mistake may render a notice of abandonment a nullity, so in the same way it may render an acceptance of the notice a nullity. In other words, though the goods were in fact lost to the respondents, such a mistake as is here assumed throughout would prevent not only the notice of abandonment but also the acceptance of abandonment from being other than a nullity. No case would then exist for the application of the words of s. 68, sub-s. 6.

Their Lordships have felt it desirable to make some observations on the question of construction out of respect to the opinions expressed in the Courts below, but it is not necessary in this case to express any final opinion. It is enough for the decision of the appeal that in their Lordships' judgment there was here no case of a notice of abandonment or an acceptance of such notice, but it was simply a case of money paid under a mistake of fact, so that the appellants who have paid are entitled to recover.

It follows that their Lordships' judgment is that the appeal should be allowed and the judgment and order appealed from be set aside: the appellants will have the costs of the hearings in the Courts below and of this appeal. They will humbly so advise His Majesty accordingly.

Solicitors for appellants: *William A. Crump & Son.*

Solicitors for respondents: *Bell, Brodrick & Gray.*

*Referred to.* SOLLE *v.* BUTCHER [1950] 1 K. B. 674

[PRIVY COUNCIL.]

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*June* 11.

JEAN MACKENZIE . . . . . . . APPELLANT;

AND

ROYAL BANK OF CANADA . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

*Canada (Ontario)—Bank—Guarantee by married woman—Undue Influence of husband—Onus of Proof—Independent Advice—Innocent Misrepresentation—Avoidance of Contract—Restitutio in integrum.*

In an action by a married woman against a bank to set aside, on the ground of the undue influence of her husband and of misrepresentation, a guarantee (with pledge of securities) given by her for the indebtedness of a company in which her husband was the principal shareholder, there is not an onus upon the bank to prove that she had independent advice; in the absence of substantive proof of the undue influence (particulars of which should be pleaded) the action fails so far as it is based upon that ground. But a contract of guarantee, like any other contract, is liable to be avoided if induced (as it was in the present case) by material misrepresentation, even if made innocently. There was no difficulty about restitutio in integrum. The fact that the bank had acted upon the contract did not preclude relief; nor had the plaintiff received under the contract anything which she was unable to restore.

Judgment of the Appellate Division [1932] O. R. 516 reversed.

APPEAL (No. 84 of 1933), in forma pauperis, from a judgment of the Appellate Division of the Supreme Court of Ontario (June 23, 1932) reversing a judgment of McEvoy J. (September 21, 1931).

The appellant, a married woman, brought an action in the Supreme Court of Ontario against the respondent bank to recover certain shares which she had hypothecated to the bank on November 21, 1921, as security for advances made or to be made to a company in which her husband was the principal shareholder. She alleged that the contract by her was induced by the undue influence of her husband and by misrepresentation.

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD MACMILLAN, and LORD ALNESS.

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The facts appear from the judgment of the Judicial Committee.

The trial judge (McEvoy J.) made an order for the reconveyance to the appellant of the securities in question. The learned judge held that the appellant's husband, and the bank through him, influenced the appellant to hypothecate her shares, and that she did so without understanding the effect of her acts or what her rights were.

The Appellate Division, by a judgment delivered by Fisher J., reversed the decision and dismissed the action. The learned judges held that the onus was not upon the defendants to prove that the plaintiff had independent advice, and that she fully understood the transaction. In their view the onus was upon her to prove duress and that the bank knew of it, but she had not proved either; further, they held that she was estopped from denying that she had independent advice. The appeal is reported at [1932] O. R. 516.

1933. Feb. 26, 27; March 1, 2, 5, 8. *Hector Hughes K.C.* and *A. E. Cluffe* (with them *Horace Douglas*) for the appellant. The circumstances of the case raised a presumption of undue influence both by the appellant's husband and the respondents' manager, and made it incumbent upon the respondents to prove that the hypothecation and guarantee were the spontaneous acts of the appellant and that she was in a position to exercise an independent will. The respondents failed so to prove. The so-called certificates of independent advice were given without knowledge of the material circumstances, and were valueless. [Reference was made to *Bank of Montreal* v. *Stuart* (1); *Inche Noriah* v. *Shaik Allie Bin Omar* (2); *Allcard* v. *Skinner* (3); *Willis* v. *Barron*. (4)] Further, it was misrepresented to the appellant by the respondents' manager in obtaining the document of November 21, 1921, that her securities were already under pledge, whereas they had been discharged therefrom. In any case material facts were not disclosed to her, and she is entitled to have the transaction set aside.

(1) [1911] A. C. 120.
(2) [1929] A. C. 127.
(3) (1887) 36 Ch. D. 145.
(4) [1902] A. C. 271.

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*Pritt K.C.* and *J. D. Watt* for the respondents. There was no presumption of undue influence by the appellant's husband so as to throw upon the respondents the onus of proving independent advice: *Talbot* v. *von Boris* (1), and cases there cited. It is sufficient that the respondents established that the appellant understood the nature and effect of the transaction. As between husband and wife undue influence may be easier of proof, but in the present case no undue influence was proved. The guarantee was not solely for the husband's benefit. In any case the onus was upon the appellant to prove that the respondents knew that there had been undue influence, and there was no evidence of that: *Talbot* v. *von Boris.* (1) No misrepresentation was proved, or found. If there was any, it was innocently made upon a bona fide misconception of the legal position. A contract will not be set aside on the ground of innocent misrepresentation unless the parties can be restored to their former position: *Kennedy* v. *Panama, New Zealand, etc. Royal Mail Co.* (2); *Bell* v. *Lever Brothers, Ld.* (3) That is not possible in this case. The bank assented to the reconstruction of the company, and not to exercise its existing rights, relying upon the guarantee. A mere concealment of material facts, not made fraudulently or wilfully, is not a ground for setting aside a contract of guarantee: *North British Insurance Co.* v. *Lloyd.* (4) The statement to the contrary in Rowlatt on Principal and Surety, 2nd ed., p. 158, is not supported by the authorities.

*Hector Hughes K.C.* was called on in reply only as to the relief to which the appellant was entitled.

June 11. The judgment of their Lordships was delivered by

Lord Atkin. This is an appeal from a judgment of the Appellate Division of the Supreme Court of Ontario, reversing a judgment of McEvoy J., who at the trial had given judgment for Mrs. MacKenzie the plaintiff, the present appellant. The action was brought to recover certain shares in Borden

(1) [1911] 1 K. B. 854, 863, 864.
(2) (1867) L. R. 2 Q. B. 580.
(3) [1932] A. C. 161, 219.
(4) (1854) 10 Ex. 523.

Company, Inc., which by an amalgamation represented 187 shares in Ottawa Dairy Company, Ld. These shares the plaintiff by a letter of hypothecation in November, 1921, had deposited with the defendant bank as security for advances made and to be made to the MacKenzie Manufacturing Company, Ld., in which her husband was the principal shareholder. The transaction was attacked on the ground of undue influence of the husband and of misrepresentation.

The facts appear to be that Mrs. MacKenzie, then a girl of 20, was married in 1901 to Mr. John Angus MacKenzie, who was then in business as a salesman. He appears to have been energetic and successful, and in 1913 he formed a company, MacKenzie, Ld., to carry on the business of manufacturers of lumbermen's and railway contractor's supplies. In 1907 Mrs. MacKenzie's father had died, leaving her the dairy shares in question, worth at the material times about $10,000, together with a house in Ottawa and some $2000. Mrs. MacKenzie in 1913 had hypothecated the shares at the bank to secure an advance either to the company or to her husband, for the benefit of the company. With the advent of the war the company prospered. Husband and wife lived in affluence in Ottawa and in a country house. In 1918 her shares were released to her. She had no money invested in the company, which represented her husband alone. In 1920 the fortunes of the company changed. The Government ceased to require its goods, and the company, tied by forward contracts, was unable to sell its goods to advantage. At the end of the year the bank advances amounted to about $200,000, and the bank was pressing for reduction and for further cover. On December 31, 1920, the plaintiff, at the request of her husband, and after interviews with Mr. Gray, the bank manager, signed the bank form of general hypothecation making her 187 Ottawa Dairy Company shares "general and continuing collateral security for payment of the present and future indebtedness and liability of MacKenzie, Ld." By the document she agreed "that the bank may grant extensions, take and give up securities, accept compositions, grant releases and discharges and otherwise deal with the customer and with other parties and securities as the bank may see fit without prejudice to the liability of the undersigned."

There was some question at the trial as to the circumstances in which this document was signed, Mrs. MacKenzie stating that her husband gave her to understand that the security was required to enable him to obtain a further advance from the bank of $20,000 to $25,000. Mr. Gray apparently expressed to her a favourable view of the prospects of the company. Unfortunately business continued to diminish, and in May, 1921, an order in bankruptcy was made against the company. In Canada companies are subject to the ordinary bankruptcy law. The bank, in pursuance of s. 88 of the general Banking Act, held security over the stock in trade and book debts of the company. The first proof of the bank showed a substantial surplus in the value of their securities over the debt. Proposals were discussed for something in the nature of a reconstruction whereby the business should be carried on by a new company. On September 13, 1921, the bank filed another affidavit of proof valuing their securities at $3000 or $4000 in excess of the debt, and about the same time served notice on the trustee in bankruptcy to redeem the securities at that figure. The effect of the notice, according to the Bankruptcy Act, is that if the trustee elects not to redeem the security, the equity of redemption vests in the creditor and "the amount of his debt shall be reduced by the amount at which the security has been valued." The trustee did so elect, and on November 14, 1921, on the application of the bank, an order of Court was made reciting the facts and ordering and declaring that an indenture of release releasing to the bank the realty and personalty of the company held by the bank which had been executed by the trustee be confirmed and ratified. It appears clear that the effect of the Bankruptcy Act on the transactions as carried out is that the debt was not simply released by operation of law but was discharged and paid by the acceptance by the bank of the company's property in exchange for the debt. Thereafter there was no indebtedness or liability of the company to which the hypothecation by the plaintiff of

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December 31, 1920, could attach. It is true that on September 13 the plaintiff and her husband had signed a letter addressed to the bank in the following terms:

"We understand that you are filing with the authorized assignee of MacKenzie, Ld., an affidavit valuing certain securities held by you at the sum of $125,000.00 and that the authorized assignee will be at liberty to accept your valuation in which case as between the authorized assignee and the bank the bank's claim would be considered paid in full.

It is our desire that you should file the affidavit in question and we hereby agree that your so doing shall not in any way release us from our obligation under guarantees to the bank nor shall our personal securities be in any way affected until the amount due to the bank by MacKenzie Ld. has been actually paid.

Yours truly,
(Sgd.) John A. MacKenzie,
(Sgd.) Jean MacKenzie."

It may very well be that in procuring the plaintiff's signature to this document the bank had in mind to extend their obligations so as to cover a contemplated reconstruction. If so they failed in their purpose, for it appears to their Lordships that the terms of this letter cannot be construed to give any right to the bank over securities once the debt had been discharged in the manner above mentioned. What had been the property of the company had become the absolute property of the bank, who might use it, exchange it, or dispose of it in any way they thought fit. It seems unreasonable to suppose that the bank were to hold the property of the guarantors until the former property of the company was actually sold for cash; or that there was any implied obligation on the bank to sell its own property for cash. The obligation, therefore, of husband and wife on this letter in the events that happened, ceased with the obligation of the company. By November, the arrangements for reconstruction were completed and were carried out in the following manner. A new company, MacKenzie Manufacturing

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Company, Ld., was formed. The bank sold to Mr. MacKenzie the assets of the old company for $125,000, MacKenzie sold them to the new company for the same price, the bank advanced the price to the company and took the assets as security for the loan. In the result, the bank were in much the same position in relation to the new company as they had been before the bankruptcy to the old. But the bank and Mr. MacKenzie required the plaintiff to enter into a guarantee of the indebtedness of the new company and a new hypothecation, and on November 21, 1921, at the bank's office, she signed the ordinary form of bank guarantee with a limit of $200,000 and an hypothecation form securing the indebtedness of the new company. Before doing so, she was assured by her husband and the bank manager that her shares were still bound to the bank, that they were gone anyway, and that she had a chance of getting them back if she signed. Mr. Gray, the bank manager, admitted that he told her that her securities were still bound to and were the property of the bank. After she had signed, she was given a form to be taken to a lawyer and signed by him, intimating that he had given her independent advice, and that she fully understood the transaction, and a form to be signed by herself to the same effect. She went over to the office of Mr. Burritt, told him that she had already signed the guarantee, and that this document had been sent over as a matter of form. According to the plaintiff, Mr. Burritt accepted that position and signed, saying he signed as a matter of form, seeing that she had already signed the guarantee, but that he had given her no advice, for he knew nothing about the new company. Mr. Burritt was not called. She returned both documents to the bank duly signed.

If it had been incumbent upon the bank to prove that the lady had had independent advice, their Lordships would have had the greatest difficulty in coming to the conclusion that the bank had discharged the onus. Independent advice to be of any value must be given before the transaction, for the question is as to the will of the party at the time of entering into the disputed transaction. Advice given after the event when the supposed contracting party is already bound is given under entirely different circumstances, with a different position presented to the minds both of the adviser and his client. It is unnecessary, however, to emphasize this point, for their Lordships are not able to take the view that the transaction was one in respect of which there was an onus upon the bank to prove that the plaintiff had independent advice. The view taken by the Appellate Division that a wife does not fall within the class of "protected" persons in respect of whom in certain relationships there is a presumption of undue influence, is clearly right, and is supported by the authorities cited in their judgment. It may be true that in some cases it is easy for the wife to discharge the onus which lies on her as on every one else outside the protected class to show that a particular contract was, in fact, procured by the undue influence of her husband. Such a case ought to be pleaded with full particulars. The pleadings in this case are in this respect defective, though the issue was apparently admitted without demur by the opposing party. But in their Lordships' view, the evidence falls far short of proof of undue influence by the husband. The plaintiff obviously possessed and exercised a will of her own. She was able generally to appreciate business conditions: and it is impossible to draw the inference that in the transactions in question her will was overborne by the stronger will of her husband.

But their Lordships have come to the conclusion that the contract cannot be allowed to stand for another reason. A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently. In this case it is unnecessary to decide whether contracts of guarantee belong to the special class where, even at common law, such an innocent misrepresentation would afford a defence to an action on the contract. The evidence conclusively establishes a misrepresentation by the bank that the plaintiff's shares were still bound to the bank with the necessary inference, whether expressed or not, and their Lordships accept the plaintiff's evidence that it was expressed, that the shares were already lost, and that the guarantee of the new company offered the only means of salving them. It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed, was a representation of fact. That it was material is beyond discussion. It consequently follows that the plaintiff was at all times, on ascertaining the true position, entitled to avoid the contract and recover her securities. There were subsequent renewals of the guarantee before the plaintiff was advised of the true facts, but counsel for the bank very properly conceded that they would be in the same position as the original guarantee. There is no difficulty as to restitutio in integrum. The mere fact that the party making the representation has treated the contract as binding and has acted on it does not preclude relief. Nor can it be said that the plaintiff received anything under the contract which she is unable to restore.

In the result, therefore, the plaintiff is entitled to succeed. Since the hypothecation, the original shares deposited with the bank have been converted into 294 shares in the Borden Company Incorporated, to which it is agreed the plaintiff's rights have attached. Up to a particular date the bank credited the plaintiff with the dividend on the shares. After that date, they applied the dividends in reduction of the company's debt. From that date the plaintiff is entitled to the amount of those dividends. The sum will no doubt be agreed, but in case of dispute there should be an inquiry as to the amount.

The appeal should be allowed; the judgment of the Appellate Division, dated June 23, 1932, should be set aside, and the order of McEvoy J., dated September 21, 1931, should be restored, with the addition of an order to pay to the plaintiff the dividends on the shares from the ascertained date. Their Lordships will humbly advise His Majesty accordingly. The defendants must pay the costs of the appeal to the Appellate Division, and such costs of the appeal to His Majesty in Council as are appropriate in an appeal in forma pauperis.

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Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

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*Discussed. In re* Earl Fitzwilliam's Agreement
[1950] 1 Ch. 448

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR ONTARIO . Appellant;

AND

PERRY . . . . . . . . . . . Respondent.

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1934
*June* 19.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Canada (Ontario) — Succession Duty — "Gift" — Marriage Settlement — Consideration—Interpretation of Statute—Evolution of Imperial enactment—Succession Duty Act (R. S. Ont.,* 1914, *c.* 24), *s.* 7, *sub-s.* 2 (*b*), *amended by* 4 *Geo.* 5, *c.* 10, *ss.* 4, 5.

A transfer of property by a husband to trustees for the benefit of his wife and the issue of their marriage, pursuant to a covenant in an ante-nuptial settlement, is not a "gift" so as to be chargeable upon his death with succession duty under the (Ontario) Succession Duty Act (R. S. Ont., 1914, c. 14), s. 7, sub-s. 2 (*b*), as amended in 1914.

The words at the end of the above enactment, beginning "of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee . . . .," apply only to the third description of "property taken" there mentioned.

Judgment of the Court of Appeal [1933] O. R. 617 affirmed on the first point; on the second, the view of the Court of Appeal disapproved, and that of Garrow J. [1933] O. R. 218 approved.

In interpreting a taxing provision taken by the legislature of Ontario from an Imperial statutory provision as amended, but without previous legislative history in Ontario, it is not permissible to consider the evolution of the Imperial provision or decisions based thereon.

Appeal (No. 88 of 1933) from a judgment of the Court of Appeal for Ontario (May 31, 1933) reversing a judgment of the Supreme Court of Ontario (January 30, 1933).

* *Present:* Lord Blanesburgh, Lord Atkin, Lord Wright, Lord Alness, and Sir Lancelot Sanderson.

J. C.
1934
Attorney-General for Ontario v. Perry.

The appellant, by an action brought in the Supreme Court of Ontario in 1932, claimed a declaration that upon the death of Cawthra Mulock in 1918, duty under the Succession Duty Act (R. S. Ont., 1914, c. 24), s. 7, as amended by 4 Geo. 5 (Ont.), c. 10, became payable upon money and securities to the value of $250,000, which the deceased had transferred to trustees in pursuance of an ante-nuptial settlement entered into by him in 1903, in consideration of his then intended marriage, for the benefit of his wife and the issue of the marriage.

The facts and the terms of the amended enactment above mentioned appear from the judgment of the Judicial Committee, which also sets out 9 Geo. 5 (Ont.), c. 9, s. 1, by which the statutory provision relevant at the date of the death of the deceased had since been amended.

The trial judge (Garrow J.) held that the duty claimed was payable under the above enactment. He was of opinion that the property was taken under a disposition operating as an immediate gift inter vivos, so as to be within s. 7, sub-s. 2 (*b*), and that marriage or a promise to marry was not such a consideration as would exempt the property transferred. He was also of opinion that the words in s. 7, sub-s. 2 (*b*), " of which property actual and bona fide possession and enjoyment shall not have been assumed, etc.," referred only to the last description of " property taken " mentioned in sub-s. 2 (*b*). The judgment is reported at [1933] O. R. 218.

The Court of Appeal, by a judgment delivered by Latchford C.J., reversed the decision and dismissed the action. The learned judges were of opinion that the transfer was not a gift, but was a transfer for good consideration; also that even if it was a gift it did not fall within s. 7, sub-s. 2 (*b*), because actual and bona fide possession and enjoyment had been assumed by the donee immediately upon the gift. The judgment is reported at [1933] O. R. 617.

1934. April 26, 27. *Wilfrid Greene K.C.* and *J. T. White K.C.* for the appellant.

*McCarthy K.C.* and *A. M. Stewart K.C.* for the respondent.

*C. H. Armstrong K.C.* appointed under r. 77 of the Rules of the Supreme Court to represent unascertained persons and interests.

The arguments appear from the judgment. In addition to cases there mentioned reference was made to *Attorney-General for Ontario* v. *Brown* (1); upon the words "money or moneys worth" in s. 7, sub-s. 3 (*d*), to *Attorney-General* v. *Earl of Sandwich* (2); and, upon the interpretation of the Ontario statute by reference to the English statutes and decisions, to *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan.* (3)

June 19. The judgment of their Lordships was delivered by

LORD BLANESBURGH. The principal question for decision on this appeal is whether property to be held upon trusts for the benefit of his wife and the issue of their marriage, transferred by a husband in pursuance of a covenant contained in marriage articles, is, within the meaning of the Succession Duty Act of Ontario, a "gift" so as to be chargeable with succession duty on the death of the husband.

That issue, with another of less general importance, was determined in favour of the Crown by the learned trial judge in the Supreme Court of Ontario: on appeal to the Court of Appeal the Crown's claim to duty was rejected, on every ground put forward in its support, and the suit of the Attorney-General for the Province in which the claim was made was by judgment dated May 31, 1933, dismissed. From that order of dismissal the Attorney-General now appeals to His Majesty in Council.

The facts are not in dispute. As formulated in the statement of claim, they were and are accepted by the respondent defendant, the legal personal representative of Cawthra Mulock, the settlor.

It was in contemplation of his marriage with Adele Baldwin Falconbridge, then an infant, that the marriage articles in question were on June 23, 1903, entered into. The parties

(1) (1903) 5 Ont. L. R. 167.
(2) [1922] 2 K. B. 500.
(3) [1933] A. C. 378.

to them were the settlor, of the first part, the father of the bride of the second part, the trustees named, of the third part, and the bride herself, of the fourth part, and on a recital that a marriage was about to be solemnized between the parties thereto of the first and fourth parts, and that it had been agreed between the parties of the first, second and fourth parts that the party thereto of the first part should assign and transfer, or cause to be assigned and transferred to the parties thereto of the third part, as trustees, the sum of $250,000, or securities for that amount to be held upon the trusts therein detailed or referred to, it was witnessed that in consideration of the said intended marriage the party of the first part covenanted and agreed with the parties thereto of the second and fourth parts that upon the contemplated marriage taking place within twelve months from the date of the articles the payment or transfer aforesaid to the trustees, parties of the third part, would be made. The trusts declared were those of a marriage settlement of personal estate, predominantly in favour of the wife and issue of the marriage, the settlor himself taking no interest thereunder except in the event, which did not happen, of his surviving his wife and all their children.

Their Lordships think it important at once to observe—the observation will be found to supply one key to the solution of the appeal—that the settlement here is one made by a husband of his own property for objects all of which are within the marriage consideration. The settlor's agreement to settle is made, and the covenant in pursuance of such agreement—expressly stated to be in consideration of the intended marriage—is entered into by him with the bride and her father alone. It may ultimately become a question decisive of the appeal whether a transaction from which, on the part of the settlor, every element of gift or bounty is so entirely absent is one upon which any claim to duty under the Succession Duty Act can be based.

The marriage was shortly afterwards duly solemnized and the settlor's covenant duly performed. The trust funds have since been held by the trustees of the marriage articles, and are still so held, no further formal settlement having ever been executed. The settlor died on December 1, 1918, and was survived by his wife and by issue of their marriage.

More than twelve years afterwards the suit above mentioned was instituted, and by his statement of claim, the Attorney-General for Ontario made against the legal personal representative of the settlor, the demand for succession duty on the $250,000, which more than twelve years before his death had been transferred by the settlor to the trustees pursuant to his covenant already stated. The institution of the proceedings so long after the death of the settlor is matter of comment. No explanation of the delay is forthcoming. It is not, however, suggested by the respondent that any equitable answer to the claim is on that score open to him. There are apparently still funds in his hands available to meet the demand for duty should it turn out to be otherwise well founded.

It is upon s. 7 of the Succession Duty Act of Ontario, and in particular upon sub-s. 2 (*b*), as the sub-section stood at the date of the settlor's death, that the claim is based.

The immediately relevant provisions of the section are those which for convenience of reference are now set forth.

" 7.—(1.) The following property . . . . shall be subject to duty at the rates hereinafter imposed :—(*a*) All property situate in Ontario and any income therefrom passing on the death of any person, whether the deceased was at the time of his death domiciled in Ontario or elsewhere. . . . .

(2.) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property. . . . . (*b*) Any property taken as a donatio mortis causa, or taken under a disposition operating or purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise made since July 1, 1892, or taken under any gift whenever made. of which property actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him whether voluntary or by contract or otherwise, except as hereinafter mentioned.

(3.) Notwithstanding anything herein contained no duty shall be payable in respect of the property . . . . (*d*) Actually and bona fide transferred for a consideration in money or money's worth paid to the transferor for his own use and benefit, except to the extent, if any, to which the value of the property transferred exceeds that of the consideration so paid."

Upon the above enactment the judicial task is to ascertain how far a transfer not purely voluntary may still be a "gift" within the meaning of sub-s. 2 (*b*), and in particular whether the transfer made by the settlor here can be properly so described.

In support of his submissions upon that question, learned counsel for the Attorney-General invited their Lordships to trace in the Imperial statute law from which it was obviously borrowed the evolution of the sub-section, and, having done so, to utilize in its interpretation in relation to settlements made in consideration of marriage the authorities, English, Scottish and Irish, bearing upon the corresponding Imperial enactment.

For reasons which will emerge as they proceed, their Lordships are not satisfied that in the circumstances this course is properly open to them. Accordingly their acceptance of the appellant's invitation is made with all reserve and really because, as they believe, the inquiry may be generally illuminating, and, in so far as it throws permitted light on the Ontario enactment in relation to the present question, significant.

It will be convenient in what follows sometimes to refer to the British Finance Acts as the Finance Acts, and to the Ontario Succession Duty Act as the Succession Duty Act, and it may at once be accepted that s. 7, sub-s. 2 (*b*), of the Succession Duty Act was originally inspired by, although it is not in its precise terms translated from, the Finance Act, 1894, s. 2, sub-s. 1 (*c*).

That sub-section enacts that property passing on the death of a deceased shall be deemed to include "Property which would be required on the death of the deceased to be included in an account under section thirty-eight of the Customs and Inland Revenue Act, 1881, as amended by section eleven of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom." Sub-s. 1 (9.) of s. 38 of the Act of 1881 there referred to is that which is now in point. As amended by s. 11 of the Act of 1889, and omitting words irrelevant, here the sub-section runs as follows: "Any property taken as a donatio mortis causa, or taken under a [*voluntary*] disposition purporting to operate as an immediate gift inter vivos, whether by way of transfer delivery, declaration of trust, or otherwise, which shall not have been bona fide made twelve months before the death of the deceased and property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."

The similarity of this sub-section to s. 7, sub-s. 2 (*b*), of the Succession Duty Act as above set forth is obvious. But the identity of the two is not complete. This was not possible if the scheme of the Ontario legislation was to be adhered to. Essential difference on this score does not, however, explain every variation between the two enactments.

To pass by, for the moment, one other to which reference must later be made, it may be taken that for present purposes the great difference between the two sub-sections consists in this—that the sub-section appears in the Ontario statute as an original enactment with no trace of its origin or history to be found either in its terms or in any other Ontario legislation, whereas the British sub-section is, on its face, an amendment of an existing Act of Parliament, which, as so amended, remains the substantive operative enactment.

Now, before considering the possible consequences of the above difference in the form of the two enactments, it will not be inconvenient at once to emphasize a clear line of demarcation between two classes of settlement made in consideration of marriage, the subject with which this appeal is immediately concerned. It will be found that this line of demarcation remains prominent throughout this judgment.

In the first class of these settlements—such settlements as the articles with which we have to do—settlements made by a husband on his own marriage for the benefit of his wife and the issue of the marriage, we see, as Kay L.J. put it in *Attorney-General* v. *Jacobs Smith* (1), " A settlement which as between the settlors is made for the most valuable consideration imaginable, that of marriage." In other words, the husband's covenant or transfer of property, under such a settlement, is the price paid by him for the hand of his bride, with no element whatever either of gift or bounty involved.

But there is a second class of settlement, such, for example, as one made by a father on the marriage of his son or daughter—a settlement made in consideration of marriage, truly enough, but not made in consideration of marriage with the settlor. In the case of such a settlement it is not true to say that the consideration moving to the settlor is " the highest consideration imaginable." In *Shadwell* v. *Shadwell* (2), for example, where a promise was made by an uncle in a letter to his nephew in anticipation of the marriage of the young man to a named lady, while Erle C.J. and Keating J. were with some difficulty able to find a consideration moving to the uncle, Byles J. could discover none. The truth is that the so-called consideration of marriage in such a case is based upon results to the settlor totally distinct from those which follow his own marriage. Indeed, in the case of settlements of this second class in the contribution of the settlor there is, found even in common parlance, an element of gift or bounty. As Lord Macnaghten observed in *Wheeler* v. *Humphreys* (3): " You give your daughter in marriage and you give a portion with your daughter." And it will be found to be of the last significance in the examination of the Finance Acts, and the authorities thereon to which their Lordships now proceed, that it is only in marriage settlements of this second class that any element of gift or bounty has ever been discovered. Nowhere has it been suggested that that element is even latent in the class of marriage settlement now in question.

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(1) [1895] 2 Q. B. 341, 354.
(2) (1860) 9 C. B. (N. S.) 159.
(3) [1898] A. C. 506, 509.

It was always held in Great Britain, under s. 38, sub-s. 1 (9.), of the Inland Revenue Act, 1881, amended as above but with the word " voluntary " remaining before the word " disposition," that an ante-nuptial settlement of the second class above alluded to, not being in law a voluntary settlement, did not fall within the second limb of the section. It is interesting here to note, as will be seen later, that something which was not a " pure and simple " gift might however have come under the third limb. In other words " gift " in the two limbs had not the same meaning. It is, however, now settled as a result of the omission of the word " voluntary " from the sub-section as incorporated in the Finance Act, 1894, that marriage settlements of the second class are brought within its second limb as well. But so far as decision is concerned, only by reason of the form of enactment. This is made very clear by the leading authority on the subject: the judgment of Palles C.B. in *Attorney-General* v. *Smyth*. (1) It was not permissible, the Chief Baron there held, in construing the sub-section of the Finance Act, merely to strike out the word " voluntary " from the previous—the 1881—description, and then to construe the description thus modified as if it were contained in an original enactment without regard to its history or evolution and irrespective of the new context in which it was found. It had been argued that the description thus arrived at would contain the word " gift " as a substantive part without any controlling context, and therefore would exclude property comprised in a settlement of the second class. But the contention was inadmissible. It was necessary to look at the repealed portion of the Act of Parliament in order to see what was the meaning of that which remained of it, and accordingly, being entitled on that

(1) [1905] 2 I. R. 553, 559.

view of the statute to regard the "disposition" as one which need not be voluntary, the Chief Baron held that a settlement by a father on the marriage of his son might be regarded within the meaning of the Finance Act as a disposition "purporting to act as an immediate gift." And the same principle in relation to a similar settlement was applied in Scotland in the case of *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (1) and in England in the case of *Attorney-General* v. *Holden*. (2) But this construction of the Act of 1894—never applied, be it remembered, to settlements in consideration of marriage other than those of the second class—did not ultimately commend itself to the British legislature, even with regard to them; and in 1910, by the Finance Act of that year, 10 Edw. 7, c. 8, s. 59, sub-s. 2, it was enacted that gifts inter vivos, in the Act of 1881, as amended, should not apply to gifts made in consideration of marriage.

Their Lordships cannot leave the consideration of the Finance Acts without referring to a series of decisions under what may be regarded as the third limb of s. 38, sub-s. 1 (9.), of the Inland Revenue Act, 1881, as amended by s. 11 of the Act of 1889. A reference to that limb of the sub-section supra, shows that the gift therein being dealt with need not be preceded by a "disposition," but that the words following seem to contemplate that there may be within their meaning a gift, although accompanied by some benefit to the donor by contract. On that part of the section it has been held that a gift does not cease to be a gift although there is some consideration for it received by the donor: a gift, it has been said, may be something which is not "a pure and simple gift." *Attorney-General* v. *Worrall* (3) and *Attorney-General* v. *Johnson* (4) may be cited as typical; and see *Attorney-General* v. *Holden*. (5) These authorities would have had greater significance on the present occasion if upon construction it were held that the final words of s. 7 (*b*) of the Succession Duty Act applied to the second limb of the

(1) (1906) 8 F. 724.
(2) [1903] 1 K. B. 832.
(3) [1895] 1 Q. B. 99.
(4) [1903] 1 K. B. 617.
(5) [1903] 1 K. B. 832, 837.

sub-section as well as to the third. But, as will presently be seen, this, in the opinion of their Lordships, is not the case.

Their Lordships now return to the consideration of the Ontario statute with the information culled from the immediately relevant authorities on the British Finance Acts, that—whereas under a form of statute in terms an amendment of another, but which as amended remains the substantive enactment, property transferred by a settlor on the marriage of another may, on the settlor's death, be subject to duty, as being in the nature of a gift—there is first of all no decision to that effect under an enactment which is original; and there is no decision anywhere that a transfer under such a settlement as the marriage articles here can for any purpose whatever be regarded as a gift.

First, then, is the Ontario sub-section, unlike the corresponding British enactment, an "original" section? In their Lordships' judgment it undoubtedly is, and must be so construed. It contains on its face no reference to any origin. It comes into Ontario legislation full grown and without ancestry. It would, in their Lordships' judgment, be contrary to all principle, for the purpose of construing it, to look at the evolution even of the same enactment under some other system of law.

Next, even if the present were such a settlement as those which in Great Britain were by decision brought within the Finance Acts, ought that same result to follow under an enactment like the Ontario statute original in form? There is no British authority that it ought: it may, perhaps, be surmised that Palles C.B. would have held that it ought not. And quite certainly caution must be exercised before the opposite conclusion is reached, because such a decision in Ontario would lead to a result which, in Great Britain, has been avoided by subsequent legislation.

And who can say that the absence of a similar amending statute in Ontario is not due to the fact that no such statute was deemed there to be necessary? Such so-called "gifts" were never caught by the Ontario Succession Act at all.

It is in these circumstances some satisfaction to their

Lordships to find that they are not in this case called upon to express any concluded opinion on this question. In its determination they would desire the assistance of the Provincial Courts, which have not here dealt with it. They are able to dispose of the appeal on another ground, and they do so. It fails, they think, for a reason which they have elaborated throughout this judgment, that the settlor's covenant or transfer in this instance had in it no element of gift or bounty whatsoever, and is therefore in no way caught by the Succession Duty Act, whether in s. 7, sub-s. 2 (*b*), of that Act, and in view of the later reference to a " gift " the word " voluntary " is, or is not, to be implied before the word " disposition."

This conclusion deprives of final importance the appellant's second attack on the decision of the Court of Appeal. But their Lordships must not pass it by. The question already referred to in another connection turns on the construction of the concluding words of s. 7, sub-s. 2 (*b*), of the Succession Duty Act, and it raises a somewhat curious point into the consideration of which amendments successively introduced into that sub-section itself find their place.

The sub-section as it stood at the date of the settlor's death is set out above. On reference to its terms it will be found that the word " property " referred to in its first limb is not repeated, but is implied, in relation to its second, and third limbs, and the question is whether the " property " mentioned last in the section is by reference carried back to the only " property " previously named (that is to the word at the beginning of the section), with the effect that the proviso applies not to the third limb of the sub-section only, but to all three. In other words the " property " here in question, coming under the second limb, escapes duty on the ground that actual and bona fide possession of it by the donee trustees was in fact assumed immediately upon the gift.

Now before considering grammatically with regard to this point the effect of the section as it stood at the settlor's death, something should be said as to its Ontario legislative history in this regard.

The section of the Inland Revenue Act, 1881, above quoted differs, it will be seen, from its existing Ontario reproduction in this: that its first two limbs are disjunctive: "any property taken as a donatio mortis causa, *or* taken under a disposition," etc., while the third limb is cumulative, and in terms independent, with the word "property" repeated: "*and property* taken under any gift." The repetition of the word "property" in the third limb following the word "and" results in this, that the same word when next used in the section is referable only to that last mentioned property: that is to say, to the third limb of the section. And such has been the construction placed upon the sub-section in Great Britain.

It will be noticed, however, that in the Ontario statute, unlike in this respect its British counterpart, all three limbs are disjunctive, the second and third being each introduced by the word "or." Moreover, when the sub-section first appeared in Ontario legislation, the word "property" remained inserted before the words "taken under any gift" the effect very clearly being, as in the British enactment, to refer the word "property" next mentioned to that third limb and to no other. But by 4 Geo. 5, c. 10, s. 5, s. 7, sub-s. 2 (*b*), of the Succession Duty Act is re-enacted, with the word "property" before the third limb omitted, and thus the section stood as above seen at the settlor's death. But not for long. The matter was taken up again by the legislature in 1919, the year following the death, and the enactment now in force—9 Geo. 5 (Ont.), c. 9, s. 1—runs as follows:—

"1. Clause (*b*) of sub-s. 2 of s. 7 of the Succession Duty Act as enacted by s. 5 of the Succession Duty Act, 1914, is repealed, and the following substituted therefor:—

(*b*)—(1.) Any property taken as a donatio mortis causa: (2.) Any property taken under a disposition operating or purporting to operate as an immediate gift inter vivos, whether by way of transfer, delivery, declaration of trust, or otherwise made since July 1, 1892. (3.) Any property taken under any gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary, or by contract or otherwise, except as hereinafter mentioned." In other words, the original sense is now restored to it without ambiguity of any kind. The question is, what interpretation is to be placed upon the sub-section in its intermediate state, between 1914 and 1919?

Now upon this point their Lordships are impressed with the purely grammatical difficulty in the way of the Crown's construction, even apart from any argument for the respondent resulting from the amendment of 1914. Grammatically it seems to them the word "property" when last used should strictly be referred back to the same word where it alone previously appears in the sub-section, and being so referred back is then necessarily carried forward with that word into both the second and the third limbs of the sub-section.

But this construction is strict and not, their Lordships think, necessarily compelling. It must, they are satisfied, yield to results, and if the result of it must be, and so they think, that referring the proviso to the first limb it would prevent there ever being under the section any donatio mortis causa at all, it must follow that the reference to "property" is confined to that word as impliedly introducing the third limb and to that word only. For, no one has suggested that if the word does not apply to property covered by the first limb it can extend to property covered by the second.

And their Lordships do not feel themselves precluded by the statute of 1919 from reaching this conclusion as to the meaning of the enactment thereby superseded. The new enactment did not necessarily mean more than that in the opinion of the legislature the enactment of 1914 being possibly ambiguous it was desirable that the Act of 1919 should resolve the ambiguity in the sense always intended.

On this point, therefore, their Lordships find themselves at variance with the Court of Appeal and in agreement with Garrow J. On the whole case, however, the appeal in their

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judgment fails, and they will humbly advise His Majesty that it be dismissed and with costs.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1934
*June* 19.

ABIGAIL (SINCE DECEASED) . . . . . APPELLANT;

AND

LAPIN AND ANOTHER . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

*New South Wales—Registration of Titles—Conflict of Equities—Transfer absolute in form but intended as security only—Failure to lodge Caveat—Unregistered Mortgagee—Purchaser without notice—Absence of search of register—Transferee with authority to realize—Real Property Act*, 1900 (*N. S. W., No.* 25).

The respondents, who were registered under the Real Property Act, 1900, of New South Wales, as proprietors of lands, transferred them to the nominee of a creditor by transfers expressed to be made in consideration of money payments, and handed the certificates of title to the transferee, who caused the transfers to be registered and indorsed upon the certificates. The transfers, though absolute in form, were made merely as security for the debt, but the respondents lodged no caveat. Subsequently the transferee mortgaged the land to the appellant to secure a loan then made. The appellant had no notice that the respondents had any equitable interest, but had not searched the register. The mortgage to him was not registered:—

*Held*, that the respondents' equity should be postponed to that of the appellant, because the respondents had armed their transferee with power to deal with the lands as owner; the appellant's failure to search the register did not affect the case, because his priority did not arise from any representation to him by the respondents, and because they had lodged no caveat. Further, that it was to be inferred that the respondents had authorized their transferee to raise money upon the lands, and accordingly the case was one of an agent exceeding his authority but acting within its apparent indicia.

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* *Present:* LORD BLANESBURGH, LORD TOMLIN, LORD WRIGHT, LORD ALNESS, and SIR LANCELOT SANDERSON.

*Dixon* v. *Muckleston* (1872) L. R. 8 Ch. 155, and *Rimmer* v. *Webster* [1902] 2 Ch. 163, applied.

Judgment of the High Court of Australia, 44 C. L. R. 166, reversed.

APPEAL (No. 124 of 1930) (1) by special leave from a judgment of the High Court of Australia (March 28, 1930) reversing a judgment of the Full Court of the Supreme Court of New South Wales (September 23, 1929) which affirmed a judgment of the Judge in Equity of the Supreme Court.

The respondents, Mark Lapin and his wife, brought an action in the Supreme Court of New South Wales in Equity against the appellant (since deceased) and other parties, claiming to be registered under the Real Property Act, 1900, of New South Wales, as proprietors of certain lands, free from an unregistered mortgage, dated September 2, 1925, in favour of the appellant, and for consequential relief.

The facts, and the effect of the material provisions of the above Act, appear from the judgment of the Judicial Committee.

The trial judge (Long Innes J.) dismissed the action, and his judgment was unanimously affirmed by the Full Court of the Supreme Court (Harvey C.J. in Equity, Stephen J., and Hammond A.J.) by judgments reported at 29 S. R. (N. S. W.) 514. Upon a further appeal to the High Court of Australia the judgment of the Supreme Court was reversed by a majority (Knox C.J., Isaacs and Dixon JJ.; Gavan Duffy and Starke JJ. dissenting). The appeal to the High Court of Australia is reported at 44 C. L. R. 166. The grounds of the judgments delivered in each of the Courts are stated in the judgment here reported.

1934. May 7, 8, 10, 11, 14. *Maughan K.C.* and *Wilfrid Barton* for the appellant. By s. 43 of the Real Property Act, 1900, except in the case of fraud, nobody dealing with a registered proprietor is concerned to inquire into the circumstances in which the registration took place, or is affected by any unregistered trust. The High Court, following its decision in *Templeton* v. *Leviathan Proprietary, Ld.* (1), held that the section protects only a registered dealing. It is submitted that that decision was wrong. Having regard to the practice of creating equitable charges, recognized in *Currey* v. *Federal Building Society* (2), it is important that the protection given by s. 43 should be maintained. The section by its express terms applies to the appellant's mortgage, although not registered. But independently of that section the mortgage was a valid incumbrance. The Supreme Court rightly inferred from the facts that the respondents authorized the Heaveners to raise money upon the land. It was to facilitate their doing so that the land was transferred to them absolutely, instead of a registered mortgage being taken. The respondents having authorized the Heaveners to raise money upon the land, and having with that object placed them in the position of absolute owners, cannot rely upon any limitation of the authority of which the appellant had not notice: *Brocklesby* v. *Temperance Permanent Building Society* (3); *Rimmer* v. *Webster.* (4) Even if no authority to raise money upon the land can be inferred, the respondents' equity (if any) should be postponed to that of the appellant. The respondents caused their transferee to appear on the register, and upon the certificate of title which she held, as unrestricted owner in fee simple, and the appellant took bona fide and without notice. [Reference was made to *Butler* v. *Fairclough* (5), and to English decisions mentioned in the judgment of the Board.] The facts in the present case are similar to those in *Honeybone* v. *National Bank of New Zealand.* (6) The appellant owed no duty to the respondents to search the register: *Agra Bank, Ld.* v. *Barry* (7); moreover, a search would have confirmed the apparent absolute title of Mrs. Heavener. Evidence of verbal representations by her to the appellant was objected to and

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(1) There was a cross-appeal against the decision of the High Court that the deceased appellant was not a moneylender within the meaning of the Moneylenders and Infants Loan Act, 1905 (N. S. W.), and as to certain equitable relief granted to the above named appellant by the High Court.

(1) (1921) 30 C. L. R. 34.
(2) [1929] 42 C. L. R. 421.
(3) [1895] A. C. 173, 180.
(4) [1902] 2 Ch. 163, 172.
(5) (1917) 23 C. L. R. 78.
(6) (1890) 9 N. Z. L. R. 102.
(7) (1874) L. R. 7 H. L. 135, 157.

excluded. Further, under the system of registration, the respondents had no equitable estate in the land, but only a personal equity giving rise to an action against their transferee: *Haji Abdul Rahman* v. *Mahomed Hassan* (1); Kerr's Australian Land Title System, pp. 356, 357.

*Piddington K.C.* and *Chetwood* for the respondents. The contention that the respondents had no equity was not advanced in any of the Courts in Australia; the arguments and all the judgments proceeded upon the view that they had an equity. It is well established that the respondents' equity is to be preferred to any subsequent equity unless the circumstances would make that inequitable: *Shropshire Union Rys. and Canal Co.* v. *The Queen.* (2) The majority in the High Court applied the correct principles to the case, and rightly held on the facts that there was no ground for postponing the respondents' equity to that of the appellant. He did not make the advances upon the faith of the memoranda of transfer, nor upon anything appearing in the register, which he did not search; nor did the evidence show that he saw the certificates of title before taking the mortgage. If he saw them he was put upon inquiry, as he knew that Heavener was Lapin's solicitor. Moreover, the evidence shows that the respondents were still in possession of part of the land; that put the appellant upon inquiry: *National Bank of Australasia, Ld.* v. *Joseph* (3). The respondents' failure to lodge caveats was not such negligence as to cause their equity to be postponed. It cannot be inferred that Mrs. Heavener was authorized to raise money upon the land. The land was impressed with a trust in favour of the respondents subject to being held as security; *Rimmer* v. *Webster* (4) is therefore distinguishable: *Burgis* v. *Constantine* (5); *Cory* v. *Eyre.* (6) The appellant's mortgage being unregistered was not protected by s. 43 of the Act. The decision of the High Court in *Templeton* v. *Leviathan Proprietary, Ld.* (7), was right for the reasons there given.

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(1) [1917] A. C. 209, 214, 215.
(2) (1875) L. R. 7 H. L. 496.
(3) [1922] S. Aust. S. R. 578 (P. C.)
(4) [1902] 2 Ch. 163.
(5) [1908] 2 K. B. 484.
(6) (1863) 1 De G. J. & S. 149, 168.
(7) 30 C. L. R. 34.

*Maughan K.C.* replied.

June 19. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellants are the representatives of E. R. Abigail, a solicitor at Sydney, who was a defendant in the action but has since died; he will hereafter be referred to as Abigail. The respondents are the Lapins, Mark and Pearl, husband and wife, who were plaintiffs in the action. Other defendants in the action were one Heavener, a solicitor, and his wife, Mrs. Heavener, who was in the matter in question his nominee. On December 5, 1923, Mr. and Mrs. Lapin executed two memoranda of transfer, duly witnessed by a solicitor in the statutory form required by the Real Property Act, 1900, of New South Wales, of two properties, in respect of which they were then respectively registered as proprietors of an estate in fee simple, to Mrs. Heavener; in the one case the consideration money was expressed to be 1800*l.*, and in the other case 1200*l.*; the receipt of these sums respectively was acknowledged on the transfers. The titles of the Lapins were at the time subject to a registered mortgage of 1320*l.* to the Union Bank, which was discharged on December 7, 1923. On December 18, 1923, Mrs. Heavener, or Heavener on her behalf, lodged these transfers and the certificate of title, which she had received from the respondents, at the land registry, where the transfers were entered in the land registry books, and particulars were indorsed on the certificate of title which the Heaveners held and which accordingly showed Mrs. Heavener as the proprietor in fee simple of the estates. On March 14, 1924, Mrs. Heavener mortgaged the properties in statutory form to the English, Scottish and Australian Bank; this mortgage was duly registered, as appears on indorsements on the certificates of title, which the mortgagee bank held. On September 2, 1925, as appears from further indorsement on the certificates of title, these mortgages were discharged, as is sufficiently clear, out of moneys lent by Abigail to the Heaveners on or about September 2, 1925; these moneys, which amounted in all to 5500*l.*, were secured by a statutory mortgage dated

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September 2, 1925, granted by Mrs. Heavener in terms as "being the registered proprietor of an estate in fee simple" in the specified properties, including the two properties in question; the mortgage was also signed by Abigail as being correct. Abigail thereafter held the certificates of title. On September 4, 1925, Abigail as mortgagee lodged a caveat under the Act in respect of these two properties. On February 24, 1926, Abigail lodged the mortgage for registration, but it was referred back by the registrar for the correction of some minor formal defects; before it was finally relodged the respondents lodged caveats and in due course brought the present action.

The respondents claimed as against the Heaveners that the register should be rectified by registering them as full proprietors of the lands and that the certificates of title should be delivered up to them; they alleged that they had handed over the certificates of title solely as collateral security for a loan in respect of another transaction, but the loan had since been discharged; they further alleged as regards the transfers that they did not sign them at all, or if they did, were induced to do so by Heavener's fraud in the belief that they were by way of further security for the other transaction. Heavener by way of answer alleged that the lands were transferred absolutely in order to discharge the Union Bank mortgage and in payment of costs due to him. Abigail was joined as defendant by the respondents, as having no better title than the Heaveners because she did not take bona fide as a purchaser for value and without notice. It was also alleged that the security was void because Abigail was acting as a moneylender in the transaction without being registered as such.

The trial before Long Innes J. took a somewhat unusual course: after evidence had been given and closed on these issues, the respondents were allowed to amend as against the Heaveners, though not in terms as against Abigail, by alleging that, if they knowingly signed the transfers, they did so on the terms that Heavener would hold the transfers as security for his professional costs and not otherwise, and that he registered the transfers in fraud of that understanding and without their knowing what he had done until October, 1925. This was a new case, contrary to the evidence given by both parties.

By his judgment delivered on March 22, 1929, Long Innes J. did not accept the evidence of the respondents, but found that they did sign the transfers, and signed them, moreover, knowing that they were signing transfers of the properties, that they were signing as transferors, and that the transferee was Mrs. Heavener ; he did, however, further find that they understood the transfers were to be by way of security only for Heavener's costs and for repayment of the mortgage debt to the Union Bank. In so finding the judge took a midway course, disbelieving the sworn evidence of both parties. As to Abigail, who gave, so the judge said, his evidence with great frankness and whose evidence the judge accepted, he found that it was not established that he was a moneylender within the meaning of the Moneylenders and Infants Loan Act, 1905 : the judge also found that Abigail, as regards the mortgage in question, discharged the onus of establishing that he was a bona fide purchaser for value without notice : he further found that Abigail made the advance in question on the faith of the transfers of December 5, 1923, and of the certificate of title in Mrs. Heavener's name and of the mortgage executed by Mrs. Heavener as registered proprietor. He accordingly held in regard to the mortgage of September 2, 1925, that the respondents were estopped by their representations from asserting as against Abigail that their equity was prior in point of time to that of Abigail.

A later mortgage given by the respondents to Abigail on the lands, which stood on a different footing, is not here material.

This judgment was on appeal affirmed by the Full Court of the Supreme Court of New South Wales. The Court agreed with the findings of fact of the trial judge : in effect, the Court held that the case was covered by the decision of the High Court of Australia in *Butler* v. *Fairclough* (1) : that Abigail's equity, though subsequent in time, was the better

(1) 23 C. L. R. 78.

equity: that the respondents' conduct "in executing a memorandum of transfer on the face of it clear and unfettered, and the failure to place on the register any embargo which would prevent the Heaveners from using those transfers at their face value, is such unreasonable and negligent conduct as to make their equity inferior" to Abigail's. They also agreed with the judge's finding that Abigail was not carrying on business as a moneylender. They accordingly dismissed the appeal.

The respondents then appealed to the High Court of Australia, the judges of which by a majority (Knox C.J., Isaacs and Dixon JJ.) allowed the appeal, Gavan Duffy and Starke JJ. dissenting.

It is difficult fairly to summarize these carefully reasoned judgments; but taking the crucial issue to be whether the equitable interest of the respondents was to be postponed to that of Abigail, the conclusion on that point of the late learned Chief Justice, Sir Adrian Knox, long a distinguished member of the Judicial Committee, may be found in substance in the following passage from his judgment (1): "The registration of Mrs. Heavener as proprietor in fee simple was consistent with the existence of an equitable interest outstanding in some other person, and not inconsistent with the whole beneficial title to the lands being in the appellants. Mrs. Heavener was in a fiduciary relation to the appellants, and was entitled under the arrangement between them and Heavener to become registered as proprietor and to hold the documents of title until the debt intended to be secured was paid off. The decisions in *Shropshire Union Rys. and Canal Co.* v. *The Queen* (2); *Carritt* v. *Real and Personal Advance Co.* (3); and *Taylor* v. *London and County Banking Co.* (4), and the observations of Farwell J. in *Rimmer* v. *Webster* (5) and *Burgis* v. *Constantine* (6) seem to me to indicate that the possessor of the prior equity is not to be postponed to the possessor of a subsequent equity unless the

(1) 44 C. L. R. 183.
(2) L. R. 7 H. L. 496.
(3) (1889) 42 Ch. D. 263.
(4) [1901] 2 Ch. 231.
(5) [1902] 2 Ch. 163, 172.
(6) [1908] 2 K. B. 484, 501.

act or omission proved against him has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was not in existence. On the evidence as it stands no such act or omission on the part of the appellants has, in my opinion, been proved. The transfers did not amount to such an act, for there is no evidence that Abigail ever saw them. The certificates of title showing Mrs. Heavener as registered proprietor were consistent with the beneficial ownership of the lands being in the appellants or any other persons, and did not indicate that she held the beneficial as well as the legal interest. The omission to lodge a caveat can have had no effect in inducing Abigail to advance the money, for it is not proved that any search was made before the money was advanced."

Isaacs J., dealing with the same issue, said (1): "The Full Court's concurrence on that point is open, as I think, to the observation that too great significance is attached to the single fact of Heavener's registration, and too little both to the lack of evidence as to Abigail's conduct being in part influenced by the absence of a caveat, and to the silence of Harris." (*)

Dixon J. lays emphasis on the fact that (2): "Although the appellants did not caveat, it does not appear that any search for caveats was made on Abigail's behalf, or that he acted in the belief that there was no caveat. The default of the appellants—if default it be—therefore did not contribute directly to any assumption upon which Abigail may have dealt with the Heaveners."

On the other hand, the final conclusion of Gavan Duffy and Starke JJ. is summed up in the following words (3): "In our opinion, the Lapins are bound by the natural consequences of their acts in arming Olivia Sophia Heavener with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the lands to other

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(*) Harris was Abigail's clerk; his connection with the case appears at p. 503 inf.

(1) 44 C. L. R. 188.

(2) Ibid. 205.

(3) Ibid. 198.

persons, and they ought to be postponed to the equitable rights of Abigail to the extent allowed by the Supreme Court."

In this conflict of eminent judicial opinion their Lordships find themselves in agreement with Gavan Duffy and Starke JJ. in regard both to their reasoning and their conclusion.

The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. It is a system which is in force throughout Australasia and in other parts as well. It is a system for the registration of title, not of deeds; the statutory form of transfer gives a title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument with all rights, powers and privileges thereto belonging or appertaining is to pass to the transferee. No notice of trusts may be entered in the register book, but it has long been held that equitable claims and interests in land are recognized under the Real Property Acts. This was held in *Barry* v. *Heider* (1) and in *Great West Permanent Loan Co.* v. *Friesen* (2); for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as cestui que trust, or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed. In the registry all statutory transfers are filed and duplicate certificates of title are kept and noted up from time to time with all registered dealings; the other duplicate certificate of title is held by the registered proprietor. The register is open to inspection and search.

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(1) [1914] 19 C. L. R. 197.

(2) [1925] A. C. 208.

Provision is made by the Act for mortgages in statutory form, and for their registration; in such a case the legal estate remains in the registered proprietor of the fee simple, and the mortgage constitutes a charge of debt on the land; hence it may not be technically correct, though it is common, to speak of the mortgagor as having the equity of redemption, though the legal title remains in him. But a practice has sprung up of affecting what amounts to a mortgage by registering an instrument of transfer of the legal title from the mortgagor, and at the same time executing a document certifying that it was by way of security only. This is no doubt done for the purpose of facilitating dealings with the land by the transferee. Such a practice has been recognized in various decisions of the Courts, and in particular in *Currey* v. *Federal Building Society.* (1) In the present case the same result was effected as the judge found as between the parties by an oral agreement; but all that appeared in the registry was the absolute grant of transfer as for full consideration paid and received; no document of qualification was executed and no caveat was lodged. In the result the public register showed to all the world, that is, to any one who cared to inspect, that the fee simple was in the two estates vested in Mrs. Heavener; the equity of redemption (if it is so to be called for convenience) was in no way indicated to any searcher of the register.

The Full Court of New South Wales regarded the present case as governed in principle by *Butler* v. *Fairclough* (2), already mentioned, where there was a conflict of equities between a prior equitable incumbrancer who had lodged no caveat and a subsequent transferee who had, after a search of the register and without notice of the unregistered equitable charge, paid the purchase consideration. It was held that the former was to be postponed: Griffith C.J. thus summed up the position (2): "It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.

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(1) 42 C. L. R. 421.

(2) 23 C. L. R. 78, 91.

Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat. In the present case the plaintiff might, if he had been sufficiently diligent, have registered his charge of June 30 on that day. The defendant, having before parting with the purchase money to Good found on searching the register that Good had a clear title, and relying on the absence of any notice of defect in Good's title, paid the agreed price."

Their Lordships think that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualification. But the only distinction between *Butler* v. *Fairclough* (1) and the present case appears to be that in the present case it was not proved that (though he had no notice of the prior charge) Abigail made any search before lending the money: he said he instructed his conveyancing clerk Harris to examine the title and left it to him. Though there is no reason why Harris should have neglected his duty, Harris was not called, it seems, because of the unfortunate course taken at the trial of raising fresh issues after the evidence was closed. That the question whether or not a search of the register had been made might be regarded as of decisive importance, does not emerge on the record or in any of the judgments until those in the High Court. The question is whether in such a case as this, where the title on the register was clear, the failure to prove a search by the second incumbrancer can make any difference. There is no reason to think that Heavener would have ventured to claim that Mrs. Heavener was proprietor in fee simple unless she was so registered, and in that sense the grant of the transfer by the respondents to her did cause or contribute to Abigail's lending the money. A search by or on behalf of Abigail would merely have shown that the transfer purported to be for full consideration, thus excluding any idea of it being by way of security. The case is closely parallel to that of *Honeybone* v. *National Bank of New Zealand* (1), where the second incumbrancer's equity was preferred, on the ground that the act of the plaintiff in falsely representing the transaction with the first incumbrancer to have been a sale and not a mortgage, and in placing him in a position to obtain a title as registered proprietor and so obtain an advance from the bank the second incumbrancer, disentitled him to put his equity in competition with the later equity. No question is raised in that case whether the second incumbrancer made any search or inquiries: the emphasis is placed on the conduct of the mortgagor. This is in accordance with the judgment of Kindersley V.-C. in *Rice* v. *Rice* (2), where the question was whether the equity of the plaintiff in respect of his lien as unpaid vendor should be preferred to that of a subsequent equitable mortgagee, who had lent his money to the purchaser against a deposit of the title deeds and of

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(1) 23 C. L. R. 78, 91.

(1) 9 N. Z. L. R. 102.

(2) (1854) 2 Drew. 73.

an assignment showing payment of the purchase money in full. The opinion of the Vice-Chancellor no doubt has not been approved in so far as he says that priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by Lord Cairns L.C. in *Shropshire Union Rys. and Canal Co.* v. *The Queen* (1), that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose. The Vice-Chancellor did not treat the possession of the title deeds as necessarily decisive: he said that the conduct of the parties having the equitable interests and all the circumstances must be taken into consideration in order to determine which has the better equity. He held that the second incumbrancer was not bound to go and inquire of the vendors whether they had received all the purchase money: he then describes the conduct of the vendors in this language: "They voluntarily armed the purchaser with the means of dealing with the estate as the absolute legal and equitable owner, free from every shadow of incumbrance or adverse equity. In truth it cannot be said that the purchaser in mortgaging the estate by the deposit of the deeds has done the vendors any wrong, for he has only done that which the vendors authorized and enabled him to do."

These words can aptly be applied to the present case if "for deposit of the deeds" there is substituted that the respondents had authorized and enabled Mrs. Heavener to register herself as owner in fee simple. Apart from priority in time, the test for ascertaining which incumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim; in the present case the respondents on the one hand enabled the Heaveners to represent themselves as legal owners in fee simple, while on the other hand it cannot be said that Abigail did or omitted to do anything which he should have done in lending the money on the security, though he might, by registering the

(1) L. R. 7 H. L. 496.

mortgage, have secured the legal title; it may be that he accepted Heavener's word that he or his wife were registered as having the legal title, but that was a true statement, and no search or inquiry that could have been made would have displaced it.

The majority of the High Court refer to the English cases which have held that the equitable interest of a beneficiary is not in general to be postponed to that of a subsequent incumbrancer who has taken for value under the trustee without notice that the trustee was not absolute owner but was committing a breach of trust. Such a rule is well established in England, and has been applied in *Shropshire Union Rys. and Canal Co.* v. *The Queen* (1) and many other later cases which it is not necessary here to cite; Lord Cairns bases the rule primarily on the fact that "there is a large, well known, recognized, and admitted system of trusts in this country," and concludes, proceeding upon that well established system, that he could not find that there was anything done by the cestui que trust which ought to forfeit and displace their equitable title. It may be that the application of this rule has been induced by the partiality of Courts of equity for their protégé, the cestui que trust; but even the equity of a cestui que trust may be defeated, as Lord Cairns said, "by conduct, by representations, by misstatements of a character which would operate and enure to forfeit and to take away the pre-existing equitable title." But the rule is one which has been applied to trusts, and not to equitable estates or interests, such as those of unpaid vendors and equitable mortgagees, or to equities like an equity to set aside a conveyance for fraud; it cannot be said that in regard to such equities there is any recognized system of trusts which ought to put their parties on inquiry in dealing with the party clothed with the legal estate. It is not here necessary to consider whether the same rule is applicable where there is a system of registration of legal title and for protection of equitable interests by caveats such as prevails under the Torrens system. Lord Selborne in *Agra Bank, Ld.*

(1) L. R. 7 H. L. 496, 506, 507.

v. *Barry* (1) pointed out that what has been called a duty of a purchaser or mortgagee to investigate title is not a duty owing to the possible holder of a latent title or security, but is simply a prudent course in the purchaser or lender's own interest; he adds, with reference to the policy of the Irish Register Act, that it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of unregistered interests. It is unnecessary here to add that when these questions need to be considered, it is always understood that the purchaser or mortgagee has not either express or constructive notice of the prior charge.

But it may be that the majority judgment in the High Court laid emphasis on the absence of search of the register by Abigail because they were of opinion that there must be something in the nature of a direct representation by the respondents to Abigail. In fact, in this case the only documents under the hand of the respondents or either of them which a search would have revealed are the transfers, the terms of which embody a transfer out and out as for full consideration: and if these had been seen by or on behalf of Abigail they might in one sense be construed as a direct representation from them to him; but it seems that the transfers were put on the register by the Heaveners, not by the respondents: the transfers could thus only in an artificial sense be described as representations made by the respondents to Abigail. In truth, the essence of the matter was the conduct of the respondents in giving the transfers to Heavener: so far as there was any representation in any strict sense to Abigail, it was made by Heavener. In *Dixon* v. *Muckleston* (2) Lord Selborne in terms distinguishes the case of an express representation from the case of acts or of negligence: a man, he says, " is not entitled to deny being bound by the natural consequence of his own acts, if it be a case of positive acts." He adds, in much the same language as that of Kindersley V.-C. quoted above: " By one or other of those means he may have armed another person with the power of going into the world under false colours ; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person, he is bound upon equitable principles by the use made of that apparent authority and power." Lord Selborne also adds that the equitable charge will be good if there has been a positive statement honestly believed.

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(1) L. R. 7 H. L. 135, 147.

(2) L. R. 8 Ch. 155, 160.

It is true that in cases of conflicting equities the decision is often expressed to turn on representations made by the party postponed, as for instance in *King* v. *King*. (1) But it is seldom that the conduct of the person whose equity is postponed takes or can take the form of a direct representation to the person whose equity is preferred : the actual representation is in general, as in the present case, by the third party, who has been placed by the conduct of the party postponed in a position to make the representation, most often, as here, because that party has vested in him a legal estate or has given him the indicia of a legal estate in excess of the interest which he was entitled in fact to have, so that he has in consequence been enabled to enter into the transaction with the third party on the faith of his possessing the larger estate. Such is the position here, which in their Lordships' judgment entitles the appellants to succeed in this appeal.

In the High Court Gavan Duffy and Starke JJ. also relied on a further or supplementary reasoning, based on the principle of an authority being acted upon to create the later equity, but acted upon either contrary to or in excess of the authority actually intended to be given. As they point out, the form of actual transfer was adopted " so that Olivia Sophia Heavener might deal with the lands as if they were her own and without the restrictions created by an instrument of mortgage under the Act of New South Wales " : she was thus necessarily trusted by the respondents as to the time and method of realization (that is, in order to pay the cash due to her husband) and not to exceed the limits of her security. On this view the case falls within the general principles laid down in *Brocklesby* v. *Temperance Permanent Building Society.* (1) Lord Herschell L.C. thus sums up the rule: "Where a person has thus been intrusted with the possession of title deeds with authority to raise money upon them, the owner of the deeds cannot take advantage of any limitation in point of amount which he has placed upon the authority as against a lender who had no notice of it." The same principle, it was held, had been applied in equity in the case of *Perry Herrick* v. *Attwood.* (2) This decision of the House of Lords was followed in the later case of *Rimmer* v. *Webster* (3), where certain stock had been transferred to a broker by the owner with instructions to sell it, but the broker abused his position as transferee of the stock in order to borrow money for his own purposes on its security: it was held by Farwell J. that the borrower's equity must prevail: Sir George Farwell thus stated the principle: "When . . . . the owner is found to have given the vendor or borrower the means of representing himself as the beneficial owner, the case forms one of actual authority apparently equivalent to absolute ownership, and involving the right to deal with the property as owner, and any limitations on this generality must be proved to have been brought to the knowledge of the purchaser or mortgagee."

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(1) [1931] 2 Ch. 294.

The foundation of the rule is that there has been an authority to deal with the property, as Gavan Duffy and Starke JJ. in the High Court have here found that there was; no doubt they have so found as an inference from all the facts, but their Lordships accept the finding. The case then becomes one of an agent exceeding the limits of his authority but acting within its apparent indicia. *Rimmer* v. *Webster* (3) has been approved by this Board in *Tsang Chuen* v. *Li Po Kwai.* (4) *Burgis* v. *Constantine* (5) contains nothing contrary to this rule; as Sir George Farwell there points out, the case before the Court was to be distinguished from *Rimmer* v. *Webster* (3) because it was one of trustee and cestui que trust, to which he thought the principles of the *Shropshire Union Rys. and Canal Co.'s* case (1) were applicable. Their Lordships agree with Gavan Duffy and Starke JJ. that on this ground also the appellants should succeed.

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(1) [1895] A. C. 173, 180.
(2) (1857) 2 De G. & J. 21.
(3) [1902] 2 Ch. 163, 173.
(4) [1932] A. C. 715.
(5) [1908] 2 K. B. 484.

This conclusion renders it unnecessary to consider the contention raised on behalf of the appellants on s. 43 of the Land Transfer Act, 1900—namely, that the section is not limited to the case of a registered mortgagee or other transferee. The question has now become immaterial in this appeal.

A contention was put forward on behalf of the respondents that on any view the respondents were in possession of at least one of the pieces of land at all material times, so that in this way Abigail was put on inquiry as to their title. No reference is made to any such point in any of the judgments. It is enough here to say that the evidence on the record is wholly inadequate to justify any finding that there was such possession.

As their Lordships are of opinion that the equity of the appellants should be preferred, it becomes unnecessary to consider further the order of the High Court that there should be an inquiry on the footing that the appellants' security was bad, to ascertain whether any part or the whole of the money lent by Abigail was used to pay off an incumbrance then existing on the property, that is, the registered mortgage of the English, Scottish, and Australian Bank. But on the basis that the appellants' security is good, but was created by the Heaveners beyond or contrary to their rights as between themselves and the respondents, there will need to be an adjustment between the Heaveners and the respondents ; their Lordships have no figures as to the value of the two properties or as to the value of the other properties included in Abigail's mortgage, nor do they know how much, if any, of the debt in respect of which the properties were charged to Mrs. Heavener remains outstanding. But it is clear that the respondents will have a claim against Mrs. Heavener if, or to the extent that, they are now unable,

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by reason of the incumbrance created in favour of Abigail, to get a reconveyance of their properties on payment to Mrs. Heavener of principal, interest, and costs.

As some reflections seemed to be directed by the respondents' counsel against Abigail in the course of the argument before this Board, it seems right to say that no ground appears for any such reflections, which find no countenance in any of the judgments; indeed, the trial judge, as already observed, accepted his evidence. It has not been thought necessary here to deal in any detail with the plea based on the Moneylenders and Infants Loan Act, 1905, except to say that in their Lordships' opinion the trial judge properly applied the provisions of the Act to the facts as he found them; but as the Full Court and the High Court have supported his decision, this concurrence of findings would in itself in the absence of any error in law conclude the matter before this Board.

In the result their Lordships are of opinion that the appeal should be allowed, the order of the High Court should be set aside and the order of the trial judge, as varied by the order of the Full Court, should be restored; the cross-appeal should be dismissed; the respondents should pay the costs of the appeal to the High Court and of these appeals. They will humbly so advise His Majesty.

Solicitors for appellant: *Galbraith & Best.*

Solicitors for respondents: *Birkbeck, Julius, Edwards & Co.*

[PRIVY COUNCIL.]

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June 28.

DOYLE . . . . . . . . . . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR NEW SOUTH WALES AND OTHERS . . . . . . . RESPONDENTS.

## ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

*New South Wales—Constitution—Validity of Statutes—Legislative Council—Election of Members—Referendum—Submission to Electors—Summons of Members—Constitution Act* (*No.* 32 *of* 1902 ; *N. S. W.*), *ss.* 7A, 16, 17A—*Constitution Further Amendment* (*Referendum*) *Act* (*No.* 2 *of* 1930 ; *N. S. W.*), *ss.* 6 *to* 9—*Constitution Amendment* (*Legislative Council*) *Act* (*No.* 2 *of* 1933 ; *N. S. W.*)—*Constitution Further Amendment* (*Legislative Council Elections*) *Act* (*No.* 5 *of* 1933 ; *N. S. W.*).

The legislature of New South Wales amended the Constitution Act, 1902 (as already amended) by Act 2 of 1933, entitled the Constitution Amendment (Legislative Council) Act, 1932, and by Act No. 5 of 1933, entitled the Constitution Further Amendment (Legislative Council Elections) Act, 1932.

Act No. 2 of 1933 provided that the members of the Legislative Council, instead of being nominated by the Governor for life, should be elected for a period of twelve years by the members of the Legislative Council and the Legislative Assembly, voting at sittings of the respective houses by secret ballot; also, that there should be omitted from the Act of 1902 s. 16, which provided for the Governor being authorized by the Crown to summon the members by an instrument under the Great Seal. The Act of 1902 was further amended by inserting s. 17A, which provided by sub-s. 6 that the elections should be held and conducted "as may be provided by law," and by adding to s. 7A a sub-s. 7, which provided that where that phrase was used in the Act the law might be made as if s. 7A (requiring a referendum) was not in force. The Bill for Act 2 of 1933 had been approved upon a referendum.

Act 5 of 1933 provided for the conduct of elections held under Act 2 of 1933. The Bill, which had been passed by both houses when Act 2 of 1933 came into force, was not submitted to a referendum.

*Held*, that objections raised by the appellant to the validity of the Acts were not sustainable.

As to Act 2 of 1933—(1.) It was competent to the legislature to make the Legislative Council elective, and to provide a special electoral body; the members of the two houses when voting were not exercising the functions of members of their respective house. (2:) That the Bill had been duly submitted to the electors upon the referendum although no copy of it had been put before each elector, and although the electoral commissioner had not inserted in the notification of the receipt of the writ a copy of the Bill, nor any statement annexed to the writ. (3.) That the deletion of s. 16 of the Act of 1902 did not impinge upon any prerogative, right, or duty of the Crown to summon the elected members. As to Act 5 of 1933—that, having regard to the provisions of Act 2 of 1933, it was not required to be submitted to a referendum, although it had been passed by both houses before Act 2 of 1932 came into force.

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* *Present :* LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS, and SIR LANCELOT SANDERSON.

Judgment of the Supreme Court of New South Wales in Equity, 33 S. R. (N. S. W.) 484 affirmed.

Appeal (No. 12 of 1934) from a judgment of the Supreme Court of New South Wales in Equity (September 5, 1933).

The appellant, a member of the Legislative Council of New South Wales, brought an action in the above mentioned Court against the respondents, who were Ministers of the Crown and officials of the State, for declarations that two Acts of the legislature of the State were invalid and for injunctions. The Acts in question were Act No. 2 of 1933, entitled the Constitution Amendment (Legislative Council) Act, 1932; and Act No. 5 of 1933, entitled the Constitution Further Amendment (Legislative Council Elections) Act, 1932. The Acts were entitled as of 1932, the year in which they were introduced, but they did not become law until 1933, when they received the Royal assent.

A motion by the appellant for an interim injunction was referred to a Court constituted under s. 6 of the Equity Act, 1901 (N. S. W.), and consisting of Harvey A.C.J., Long Innes J. and Davidson J. Upon the hearing the respondents demurred, ore tenus, to the statement of claim. By a judgment, delivered by the Acting Chief Judge in Equity, the demurrer was upheld. The proceedings are fully reported at 33 S. R. (N. S. W.) 484.

The material statutory enactments appear from the judgment of the Judicial Committee.

1934. May 31; June 1, 4. *Piddington K.C.* and *G. F. Farrer* for the appellant.

*Wilfrid Greene K.C.*, *Maughan K.C.*, and *Wilfrid Barton* for the respondents.

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The contentions upon behalf of the appellant appear from the judgment of the Judicial Committee. The respondents were called upon only as to the effect of s. 5 of the Colonial Laws Validity Act, 1865, and the deletion of s. 16 from the Constitution Act, 1902 (N. S. W.).

[Reference was made to *Attorney-General for New South Wales* v. *Trethowan* (1); *McCawley* v. *The King* (2); *In re Initiative and Referendum Act* (3); *Piddington* v. *Attorney-General* (4); *Tooth* v. *Power* (5); Redlich's Procedure of the House of Commons, vol. ii., p. 47; Maitland's Constitutional History of England, p. 283; Keith's Responsible Government in the Dominions, 2nd ed., vol. i., p. 99.]

June 28. The judgment of their Lordships was delivered by

LORD TOMLIN. This appeal raises questions as to the constitutional validity of two Acts of the legislature of New South Wales. The Acts are first an Act (hereinafter referred to as "the Reform Act") No. 2 of 1933, having the short title of the Constitution Amendment (Legislative Council) Act, 1932, and secondly an Act (hereinafter referred to as "the Machinery Act") No. 5 of 1933, having the short title of the Constitution Further Amendment (Legislative Council Elections) Act, 1932.

In August, 1933, the appellant launched an action against the respondents in the Supreme Court of New South Wales in its equitable jurisdiction claiming declarations impeaching the validity of the Acts in question and seeking relief by injunction, and otherwise, based upon such declarations.

The respondents demurred to the statement of claim. After several days' argument the demurrer was upheld, the Court being of opinion that the whole of the matters relied upon by the appellant were matters of law, and that the challenge to the validity of the Acts in question was ill-founded.

Against this decision the appellant has appealed to His Majesty in Council.

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(1) [1932] A. C. 526.
(2) [1920] A. C. 691.
(3) [1919] A. C. 935.
(4) (1933) 33 S. R. (N. S. W.) 317.
(5) (1889) 10 N. S. W. R. (Eq.) 143, 158.

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The constitutional history of New South Wales, so far as it is material to the present case, begins in 1855 with the Imperial statute 18 & 19 Vict. c. 54. (1) That statute was passed for the purpose of enabling Her Majesty the Queen to assent, subject to certain amendments, to a Bill passed by the Legislative Council of New South Wales for establishing a bicameral parliament and reserved for the Queen's assent. The Bill, as amended, was scheduled to the Imperial statute, and was referred to therein as the said reserved Bill. When it became law as the result of the Imperial statute, it was generally known in New South Wales as, and is still called, the Constitution Act.

The Imperial statute provided (inter alia) as follows:—

"4. It shall be lawful for the legislature of New South Wales to make laws altering or repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said Colony, subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars until and unless the said conditions shall be repealed or altered by the authority of the said legislature.

9. In the construction of this Act the term 'Governor' shall mean the person for the time being lawfully administering the Government of New South Wales; and the word 'legislature' shall include as well the legislature to be constituted under the said reserved Bill and this Act, as any future legislature which may be established in the said Colony under the powers in the said reserved Bill and this Act contained."

The Constitution Act set up a bicameral parliament consisting of a Legislative Council and a Legislative Assembly and empowered the new legislature to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever and (subject to conditions as to majorities, subsequently duly repealed) authorized it to alter the constitution of the Legislative Council.

From the date of the Constitution Act, therefore, within

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(1) The Short Titles Act, 1896, assigns the statute the title "The New South Wales Constitution Act, 1855."

New South Wales the Crown had power, by and with the advice and consent of the Council and Assembly, to make laws for the purposes mentioned in the Constitution Act.

By the Colonial Laws Validity Act, 1865, which applied to New South Wales, a representative legislature was defined as follows: "Representative legislature shall signify any colonial legislature which shall comprise a legislative body of which one-half are elected by the inhabitants of the Colony." The legislature of New South Wales was within the definition.

By s. 5 of the same Act, it was provided as follows: "5. Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony."

In the year 1902, by an Act of the New South Wales legislature, No. 32 of that year, and hereinafter called the Constitution Act, 1902, the constitution of New South Wales was altered and the new constitution was defined.

The sections of this Act, so far as material, to which it is necessary to refer, are as follows:—

"3. In this Act, unless the context or subject-matter otherwise indicates or requires,—'the legislature' means His Majesty the King with the advice and consent of the Legislative Council and the Legislative Assembly.

5. The legislature shall, subject to the procedure of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever. . . . .

7. The legislature may, by any Act, alter the laws in force

for the time being under this Act or otherwise concerning the Legislative Council, and may provide for the nomination or election of another Legislative Council to consist of such members to be appointed or elected by such persons and in such manner as by any such Act is determined: Provided that every Bill passed for any such purpose shall be reserved for the signification of His Majesty's pleasure thereon, and a copy of such Bill shall be laid before both Houses of the Imperial Parliament thirty days at least before His Majesty's pleasure thereon is signified.

10. The Governor may fix the time and place for holding every session of the Legislative Council and Assembly, and may change or vary such time or place as he may judge advisable and most consistent with general convenience and the public welfare, giving sufficient notice thereof. He may also prorogue the Legislative Council and Assembly, and dissolve the said Assembly by proclamation or otherwise whenever he deems it expedient.

16. It shall be lawful for His Majesty, by an instrument under the sign-manual, to authorize the Governor to summon to the Legislative Council by instrument under the Great Seal any person he thinks fit, and every person so summoned shall thereby become a member of the Legislative Council: . . . .

23. The Governor may, as occasion requires, in the name of His Majesty, by instrument under the great seal, summon and call together a Legislative Assembly."

In 1929, the Constitution Act, 1902, was amended by Act No. 28 of that year, by the insertion of a section in the following terms:—

"7A.—(1.) The Legislative Council shall not be abolished nor, subject to the provisions of sub-s. 6 of this section, shall its constitution or powers be altered except in the manner provided in this section.

(2.) A Bill for any purpose within sub-s. 1 of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

(3.) On a day not sooner than two months after the passage of the Bill through both houses of the legislature the Bill shall be submitted to the electors qualified to vote for the election of members of the Legislative Assembly. Such day shall be appointed by the legislature.

(4.) When the Bill is submitted to the electors the vote shall be taken in such manner as the legislature prescribes.

(5.) If a majority of the electors voting approve the Bill, it shall be presented to the Governor for His Majesty's assent.

(6.) The provisions of this section shall extend to any Bill for the repeal or amendment of this section, but shall not apply to any Bill for the repeal or amendment of any of the following sections of this Act, namely, ss. 13, 14, 15, 18, 19, 20, 21 and 22."

By Act No. 2 of 1930, Constitution Further Amendment (Referendum) Act, 1930, provisions were made for submitting a Bill (known as the Bavin Bill) for altering the constitution of the Legislative Council to a referendum in accordance with the provisions of Part III. of the Act. Part III. of the Act contained provisions for the conduct of a referendum where any Bill was submitted to a referendum.

By s. 4, sub-s. 1, it defined referendum as meaning (unless the contrary intention appeared) the submission of a Bill to the electors in pursuance of the authority of any Act passed either before or after the commencement of Part III. of the Act.

It also contained the following provisions :—

" 6. Where any Bill is to be submitted to a referendum, a writ for a referendum may be issued by the Governor. The writ shall be directed to the electoral commissioner.

7.—(1.) The writ may be in or to the effect of the form A in the second schedule to this Act, and shall appoint a day for taking the votes of the electors, and a day for the return of the writ. . . . .

8. The Governor may cause to be attached to the writ, a copy of the Bill, or a copy of a statement setting out : (*a*) the text of the Bill ; (*b*) the text of the particular provisions (if any) of any Act proposed to be textually altered by the Bill, and the textual alterations proposed to be made therein.

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9. The electoral commissioner shall forthwith after the receipt of the writ :—(*a*) indorse on the writ the date of the receipt by him ; (*b*) cause to be inserted in the 'Gazette' and in two or more newspapers circulating in the State a notification of the receipt of the writ, and of the days appointed for the taking of the votes of the electors and for the return of the writ; (*c*) cause a copy of the Bill or of the statement (if any) attached to the writ to be exhibited at each court of petty sessions throughout the State ; (*d*) forward a copy of the writ and of the proposed Bill, or of the statement (if any) attached to the writ, to the returning office for each electoral district."

The Bavin Bill referred to in the last mentioned Act was never, in fact, submitted to a referendum, nor were two further Bills (one for repealing s. 7A, introduced into the Constitution Act, 1902, by the Act No. 28 of 1929, and the other for abolishing the Legislative Council) which were before their Lordships' Board in the case of *Attorney-General for New South Wales* v. *Trethowan* (1), ever submitted to a referendum.

The Bill for the Reform Act passed through both houses of the legislature by December 16, 1932.

By an Act, No. 1 of 1933, it was provided that such last mentioned Bill should be submitted by way of referendum to the electors qualified to vote for the election of members of the Legislative Assembly, and May 13, 1933, was appointed as the date upon which the votes of the electors at such referendum should be taken, and it was also provided that the referendum should be conducted in accordance with the provisions of Part III. of the Act No. 2 of 1930 as thereby amended.

The Bill for the Reform Act was duly submitted to a referendum in accordance with Act No. 1 of 1933, and thereafter received the Royal assent.

The Reform Act amended the Constitution Act, 1902, as amended by subsequent Acts, and by so doing in substance provided for the reconstitution of the Legislative Council. The principal changes made were the reduction of the number of members to 60, the limitation of the term of service of a member of the Legislative Council from life to 12 years, the substitution for nomination of election by a system of proportional representation, the electors being the members of the Legislative Council and the members of the Legislative Assembly voting as one electoral body and recording their votes at sittings of the respective Houses of the Parliament.

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(1) [1932] A. C. 562.

The amendments introduced by the Reform Act also provided that the voting for members of the Legislative Council should be by secret ballot, and that the elections should be held and conducted and the votes should be counted and transferred as might be provided by law. Further amendments added to s. 7A of the Amended Constitution Act, 1902, a sub-s. 7 to the effect that in any case in relation to which the expression " as might be provided by law " was used in the Reform Act, the law might be made as if s. 7A was not in force, and might be so made at any time, either before or after the appointed day being the day as from which the Legislative Council should be reconstituted. Another amendment made was the omission from the Constitution Act, 1902, of s. 16.

The Bill for the Machinery Act had passed both Houses before the Bill for the Reform Act received the Royal assent. The Bill for the Machinery Act was not submitted to a referendum, and in due course received the Royal assent.

The Machinery Act still further amends the Constitution Act, 1902, for the purpose of regulating the elections to the Legislative Council under the alterations in the Constitution made by the Reform Act.

Now the complaints of the appellant, as their Lordships understand them, may be put in this way. It is said first that the Reform Act was ultra vires the New South Wales legislature, because it violated, in its provisions with regard to the election of the new Legislative Council, certain fundamental principles which, so far as such legislature is concerned, are inviolable. Secondly, that it was not properly submitted to the electorate, and therefore was never qualified to receive the Royal assent, and is therefore no Act at all. Thirdly, that the deletion of s. 16 from the Constitution Act, 1902, was an interference with the Royal prerogative, and as such was ultra vires. Fourthly, that the Machinery Act is not a valid Act because it

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ought to have been submitted to a referendum before being presented for the Royal assent; and fifthly, that the law according to which the elections of members must be conducted must be a law, every step in the process of enacting which must have occurred after the Reform Act became law, and that the Machinery Act does not satisfy this description and cannot therefore be relied on as the law regulating the conduct of such elections.

In their Lordships' opinion, all these objections to the Acts in question are unsustainable.

As to the first point, the fundamental principles alleged to be infringed were not clearly specified or defined, but their infringement was said to arise from the provisions which, in effect, for the purpose of the elections, create an electoral college of the members of the two houses and from the provision for a secret ballot. The argument on this part of the case was based, in their Lordships' view, upon a misconception. The electors are, it is true, identified by reference to their quality as members of one or other of the two Houses, but when they elect they are not exercising the function of members of either House, but the function of electors, and in the provisions made for the exercise of these functions, no violation of fundamental principle is involved.

It was clearly within the power conferred by s. 7 of the Constitution Act, 1902, to make the Legislative Council elective, and to select the electors from such category or categories of persons as should be determined by the Act making the alteration. Nor is it suggested that s. 7 or any Act passed in exercise of the powers of s. 7 is otherwise than valid under s. 5 of the Colonial Laws Validity Act, 1865. If, therefore, the argument based upon the alleged infringement of fundamental principles fails, as their Lordships think it does, the validity of the provisions in regard to the elections and secret ballot cannot be impeached.

As to the second point, it is urged that a submission of the Bill to a referendum necessarily involves bringing to the attention of each elector the contents of the Bill, and that this was not done as required by the terms of the Constitution

Act, 1902, as amended by subsequent Acts, and therefore the Bill for the Reform Act was never qualified to receive the Royal assent. The argument, in their Lordships' judgment, involves placing upon the words of the relevant sections meanings which they will not bear.

Sect. 7A of the Amended Constitution Act, 1902, provides that the Bill shall not be presented for the Royal assent until it has been approved by the electors in accordance with the section. It further provides that on a day not sooner than two months after the passage of the Bill through both Houses, the Bill shall be submitted to the electors, and that when the Bill is submitted to the electors the vote shall be taken as the legislature prescribes. All this points, in their Lordships' opinion, to the view that submission to the electors means submission to the votes of the electors, and does not mean putting a copy of the Bill before each elector. This view of the matter is confirmed by the definition of referendum in s. 4 of Act No. 2 of 1930, and by the language of s. 2 of Act No. 1 of 1933. If this be so, the only question is whether the procedure prescribed by the relevant statutes was complied with. It is not alleged that there was any failure to comply with the requirements of ss. 6, 7, 8 and 9 of the Act No. 2 of 1930, unless they can be construed in the sense for which the appellant contends. He argued that s. 9 (*b*) requires the electoral commissioner to publish not merely a notification of the receipt of the writ, but also to insert in the notification a copy of the Bill, or of any statement annexed to the writ, and this the commissioner did not do. This construction of the language cannot, in their Lordships' opinion, be supported. It is impossible to enlarge the content of the phrase, "a notification of the receipt of the writ," so as to include that which the appellant desires to make it cover. It is for the legislature to determine what is sufficient to bring the meaning and effect of this Bill before the electorate. That it has done, and the language employed cannot be stretched because, to some, the provisions are not satisfactory.

It was also argued that the Bill in question could not be submitted to the electorate without the earlier Bills dealing with the Legislative Council being also submitted. No support can be found for any such argument.

As to the third point, with reference to the deletion of s. 16, the argument of the appellant seems to their Lordships to be based upon a misconception of the function of s. 16. That section contains the machinery by which the members of the former Legislative Council were selected—namely, by the nomination of the Crown, and nothing else. Its omission was necessary, having regard to the introduction of election, and does not impinge upon any prerogative, right, or duty of the Crown to summon to Parliament the members of the Legislative Council who have been duly elected members under the new constitution, nor is this position rendered otherwise because in the case of the Legislative Assembly express provision is made for summons by the Crown.

As to the fourth and fifth points, their Lordships are of opinion that the Machinery Act having received the Royal assent after the Reform Act, exactly satisfies the words "as may be provided by law" in sub-s. 6 of the s. 17A inserted by the Reform Act in the amended Constitution Act, 1902 (1), and that notwithstanding that the Bill for the Machinery Act may have passed both houses before the Reform Act received the Royal assent. Further, in their Lordships' judgment, the additional sub-s. 7 added by the Reform Act to s. 7A of the amended Constitution Act, 1902 (2), expressly exempted such a Bill as that which became the Machinery Act from the necessity of being submitted to a referendum.

For these reasons their Lordships are of opinion that the appeal fails and should be dismissed, and they will humbly advise His Majesty accordingly. The costs of the appeal must be paid by the appellant.

Solicitors for appellant: *Galbraith & Best.*

Solicitors for respondents: *Light & Fulton.*

(1) Sect. 17A provided by sub-s. 6: "the elections shall be held and conducted as may be provided by law."

(2) Sub-s. 7 added to s. 7A provided: "in any case in relation to which the expression 'as may be provided by law' is used in the Constitution Amendment (Legislative Council) Act, 1932, the law may be made as if this section were not in force and may be so made at any time before or after the appointed day."

[PRIVY COUNCIL.]

AKERELE . . . . . . . . . . . . . APPELLANT;

AND

THE KING . . . . . . . . . . . . RESPONDENT.

J. C.*
1934
July 3.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

*Nigeria—Jurisdiction—Police Magistrate—Power of Chief Justice to enlarge Jurisdiction—Supreme Court Ordinance (Laws of Nigeria,* 1923, *c.* 3), *ss.* 45, 46—*Criminal Procedure Ordinance (Laws of Nigeria,* 1923, *c.* 20), *s.* 71.

Sect. 46 of the Supreme Court Ordinance (Nigeria) does not empower the Chief Justice to make a general order increasing the criminal jurisdiction of all police magistrates indiscriminately. The power conferred by that section is intended only to meet cases of special urgency or emergency, and enables the Chief Justice to issue to an individual commissioner a special order increasing his civil or criminal jurisdiction.

Sect. 71 of the Criminal Procedure Ordinance (Nigeria) merely empowers the Court which is conducting a preliminary investigation to dispose of the charge then and there if it appears that the offence can suitably be dealt with under the powers possessed by the Court; the section does not increase those powers.

Judgment of the Supreme Court reversed; convictions and sentences set aside.

APPEAL (No. 17 of 1934) by special leave from a judgment of the Supreme Court of Nigeria (April 15, 1933) which affirmed convictions of the appellant, and sentences passed upon him, by the District Court of Lagos (March 20, 1933).

The only question arising upon the appeal was whether the police magistrate before whom the appellant was tried had jurisdiction to try him summarily and to pronounce the sentences which he did.

The facts, and the material provisions of ss. 45 and 46 of the (Nigeria) Supreme Court Ordinance, and the terms of an order made by the Chief Justice under s. 46, upon which the question mainly depended, appear from the judgment of the Judicial Committee.

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* *Present:* LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ALNESS, and SIR LANCELOT SANDERSON.

1934. June 7. *R. F. Irving* for the appellant. Under s. 467, sub-s. 3 (*c*), and s. 468 of the Criminal Code Ordinance the offences with which the appellant was charged were each punishable by fourteen years' imprisonment. The only jurisdiction which the police magistrate had under s. 45 of the Supreme Court Ordinance was the discretionary jurisdiction given by the third paragraph of the section, and under that he could not inflict any punishment exceeding six months' imprisonment. Under s. 46 the Chief Justice had no power to increase the jurisdiction of all the police magistrates indiscriminately. Further, his order does not purport to enlarge the category of the cases which may be tried, but merely to increase the punishment which could be given. Sect. 71 of the Criminal Procedure Ordinance does not purport to increase the powers possessed by the Court.

*Harold Christie K.C.* and *Kenelm Preedy* for the Crown. Under s. 19 of the Interpretation Ordinance the Chief Justice could exercise the power given by s. 46 of the Supreme Court Ordinance without naming the holders of the office to whom the order applied. Although the order referred to all the police magistrates, it referred to only three of the commissioners of Supreme Courts, who were numerous. The power given by s. 46, however construed, is very wide. Even if the order does not enlarge the category of cases which may be tried under the earlier part of the section, it increases the punishment which can be inflicted when the discretionary power given by the last paragraph is being exercised, as it was in this case. If that was not so, the police magistrate had jurisdiction under the general terms of s. 71 of the Criminal Procedure Ordinance.

Their Lordships intimated that they would humbly advise His Majesty that the appeal should be allowed, and that their reasons would be stated later.

July 5. The reasons of their Lordships were delivered by LORD MACMILLAN. At the conclusion of the hearing of this appeal their Lordships intimated that they would humbly advise His Majesty that the appeal should be allowed and that the convictions and sentences appealed from should be set aside. Their Lordships now state their reasons for so advising.

The appellant was charged in the District Court of Lagos (1.) with forging a Government tender and (2.) with fraudulently uttering the forged tender, contrary to ss. 467 and 468 respectively of the Criminal Code of Nigeria. He was tried summarily before a police magistrate, who on March 20, 1933, found him guilty on both charges and sentenced him to nine months' imprisonment with hard labour in respect of the first charge and to six months' imprisonment with hard labour in respect of the second charge, the sentences to run concurrently.

The only question with which their Lordships are concerned is whether the police magistrate had jurisdiction to try the case summarily and pronounce the sentences which he did.

The police magistrate was ex officio a commissioner of the court and the jurisdiction of commissioners in criminal matters is defined by s. 45 of the Supreme Court Ordinance as follows :—

" 45. In criminal matters, every commissioner shall have jurisdiction for the summary trial and determination of criminal cases, that is to say,

Where any person is charged with any offence or act punishable either by fine not exceeding fifty pounds or by imprisonment not exceeding six months or by both ;

Where any person is charged with any offence or act punishable or in respect of which any penalty may be recovered, or order made for the payment of money according to law upon summary conviction ;

Where any person is charged with any offence appearing to be of such nature, that, if proved, it would be adequately punished with any one or other of the following punishments, viz. :—imprisonment for not more than six months, or fine not exceeding fifty pounds—such fine in default of payment to be enforced by distress or by imprisonment for not more than six months . . . ."

The next section of the Ordinance reads as follows :—

"46. The Chief Justice may, by special order under his hand and the seal of the Court, authorise an increased jurisdiction in civil or criminal matters, or in both, to be exercised by a commissioner to the extent specified in the said order. Such special order may at any time be revoked by the Chief Justice by an instrument under his hand and the seal of the Court, but no such revocation shall prejudice the issue of a new special order in the same or in different terms to the same commissioner or to the person acting temporarily as his substitute."

By an order dated February 24, 1928, purporting to be made under the provisions of s. 46 of the Supreme Court Ordinance, the then Chief Justice (Sir Ralph Combe) ordered (inter alia) as follows :—

"I hereby authorize an increased jurisdiction, viz. :—(A) In criminal matters, jurisdiction to inflict punishment up to a fine not exceeding 100*l*. or imprisonment for a term not exceeding twelve months or both to be exercised by all police magistrates and acting police magistrates, by all station magistrates and acting station magistrates, by the district officer for the Colony and by the commissioners of the Supreme Courts at Epe, Badagry and Kaduna."

On his conviction, the appellant asked for and obtained a stated case to the Appeal Court on the grounds (inter alia) that the magistrate was wrong in law in trying the appellant summarily and in sentencing the appellant to nine months' imprisonment with hard labour on the first count. The appeal was heard by Sir Donald Kingdon C.J. sitting as a Divisional Court, and was dismissed on April 15, 1933. The learned Chief Justice held that upon the correct interpretation of ss. 45 and 46 of the Supreme Court Ordinance and the order of Chief Justice Combe of February 24, 1928, the magistrate had jurisdiction to try the case summarily and that the magistrate was empowered by the provisions of those sections and the order of February 24, 1928, to inflict the punishment of nine months' imprisonment on the first count.

The judgment of the learned Chief Justice does not deal with the question which became the main topic of argument before their Lordships—namely, whether the order of February 24, 1928, had been competently made. The appellant, however, in his case to this Board expressly states that the point was argued at the hearing before the Divisional Court.

The magistrate, in deciding to try the case summarily, did so because, in the exercise of the discretion conferred upon him by the third paragraph of s. 45, the offences with which the appellant was charged appeared to him to be of such a nature that if proved they would be adequately punished by a punishment within his competence, which he conceived to extend, in virtue of the order of February 24, 1928, to a fine of 100*l*. or imprisonment for twelve months. The sentence of nine months' imprisonment which he pronounced in respect of the first charge was, of course, also dependent for its justification on the validity of the order of February 24, 1928.

In their Lordships' opinion, s. 46 of the Supreme Court Ordinance did not empower the Chief Justice to make a general order in the terms of the order of February 24, 1928, increasing the criminal jurisdiction of all police magistrates indiscriminately. The power conferred on the Chief Justice by s. 46 is to make a "special order" increasing the jurisdiction to be exercised, not by commissioners generally, but, "by a commissioner." That the special order is intended to be applicable to an individual and not to a class is put beyond doubt by the second sentence of s. 46, which provides that where a special order is revoked, this is not to prejudice "the issue of a new special order . . . . to the same commissioner." The power conferred on the Chief Justice is plainly one intended to meet cases of special urgency or emergency and enables him to issue to an individual commissioner a special order increasing his civil or criminal jurisdiction to any extent specified in the order. It would certainly have been remarkable if the Ordinance had given the Chief Justice an unlimited power to increase at his own hand the jurisdiction, civil and criminal, of all commissioners

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to any extent and presumably to confer on all commissioners the power to try summarily cases which might be punished by such penalties, however extended.

The order of February 24, 1928, was thus, in their Lordships' opinion, ultra vires of the Chief Justice who made it. Consequently, the decision of the police magistrate to try the present case summarily and the sentence of nine months' imprisonment which he passed on the appellant in respect of the first charge, which decision and sentence both proceeded on the assumption of the validity of the order of February 24, 1928, were unjustified. Their Lordships find it unnecessary to express any opinion on the question of the interpretation of the terms of the order, and have proceeded on the assumption that if it had been intra vires it would have effectively extended the jurisdiction of the police magistrate, so as to justify him in trying the case summarily and pronouncing the sentence on the first count, which he did.

Counsel for the Crown sought to find an alternative justification in s. 71 of the Criminal Procedure Ordinance, which provides that "if it shall appear to the Court in the course of a preliminary investigation that the offence is of such a nature that it can be suitably dealt with under the powers in criminal cases possessed by the Court, the Court may . . . . hear and finally determine the matter, and either convict the accused or dismiss the charge." But this section merely empowers the Court which is conducting a preliminary investigation to proceed to dispose of the charge then and there if it appears to the Court that the offence is of such a nature that it can be suitably dealt with under the powers possessed by the Court conducting the preliminary investigation. The section does not enlarge these powers and is consequently of no avail to the Crown for the present purpose.

Their Lordships at the hearing were accordingly of opinion that they should humbly advise His Majesty that the appeal should be disposed of as above stated.

Solicitors for appellant : *Oldfields.*
Solicitors for respondent : *Burchells.*

[PRIVY COUNCIL.]

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KHOO TEK KEONG . . . . . . . . APPELLANT;

AND

CH'NG JOO TUAN NEOH (SINCE DECEASED) AND ANOTHER . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

*Straits Settlements—Breach of Trust—Investment—Trustee with absolute discretion—Loans on unvalued jewellery—Loans without security—Relief from Liability—Trustees Ordinance (No.* 14 *of* 1929; *Str. Setts.*), *s.* 60.

The will of a testator domiciled in the Straits Settlements created a trust fund and provided that the trustees might invest trust moneys in such investments as they in their absolute discretion thought fit. The sole surviving trustee, a son of the testator, lent trust moneys at interest upon the security of deposited jewellery without independent valuations, and made other loans without taking security.

By Ordinance No. 14 of 1929, s. 60, the Court may relieve a trustee, wholly or partly, from personal liability for a breach of trust, if it appears to the Court that he has acted honestly and reasonably, and ought fairly to be excused:—

*Held*, (1.) that the loans upon the security of jewellery were not breaches of trust in the absence of proof that the security was insufficient when the loans were made, but that the unsecured loans were not investments, and therefore were made in breach of trust; (2.) that the trustee was not entitled to relief under the Ordinance, because, although he had acted honestly, he had not considered whether the unsecured loans were dispositions which it was prudent and right for him to make as a trustee, but had treated it as sufficient that the testator himself made similar loans in his lifetime.

*Semble*, an appeal lies from the exercise by a trial judge of the discretion conferred by s. 60 of the Ordinance.

Judgment appealed from varied.

APPEAL (No. 66 of 1933) from an order of the Supreme Court of the Straits Settlements, in its appellate jurisdiction (August 31, 1932), reversing, so far as is material to the present appeal, an order of Whitley J. (May 19, 1932).

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* *Present:* LORD BLANESBURGH, LORD THANKERTON, and LORD RUSSELL OF KILLOWEN.

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The questions arising upon the appeal were: Whether the appellant, as sole surviving trustee under the will of a testator domiciled in the Straits Settlements, had been guilty of breaches of trust in lending trust moneys at interest (*a*) upon the security of deposits of jewellery, (*b*) without security, to certain chetties. And, if the appellant had been guilty of a breach or breaches of trust, whether he was entitled to relief from personal liability under s. 60 of the Trustees Ordinance (No. 14 of 1929). The will provided that the trustees might invest trust moneys in such investments as they in their absolute discretion thought fit.

The facts, and the material provisions of s. 60 of the Ordinance, appear from the judgment of the Judicial Committee.

Whitley J. held that the loans should not be held to be breaches of trust, since the testator, the appellant's father, had been accustomed during his life to make similar loans. He was of opinion also that if the loans were breaches of trust the appellant was entitled, under s. 60 of the Ordinance, to be relieved from personal liability.

The Appellate Court (Murison C.J., Pritchard and Terrell JJ.) held that both kinds of loans above mentioned were made in breach of trust, and that the present appellant was not entitled to relief under s. 60 of the Ordinance, as, although he had acted honestly, he had not acted reasonably.

1934. July 2, 3. *Lavington* for the appellant.

*J. M. Whitaker K.C.* and *Sir Henry Wynne* for the respondents.

[Reference was made to *In re Chapman* (1); *In re Turner* (2); *In re Kay* (3); *In re Stuart* (4); *In re Lord de Clifford's Estate* (5); *In re Mackay* (6); *In re Allsop* (7); *Palmer* v. *Emerson* (8); *Chapman* v. *Browne* (9); *National*

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(1) [1896] 2 Ch. 763.
(2) [1897] 1 Ch. 536.
(3) [1897] 2 Ch. 518.
(4) [1897] 2 Ch. 583.
(5) [1900] 2 Ch. 707.
(6) [1911] 1 Ch. 300.
(7) [1914] 1 Ch. 1.
(8) [1911] 1 Ch. 758.
(9) [1902] 1 Ch. 785.

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*Trustees Co. of Australasia, Ld.* v. *General Finance Co. of Australasia, Ld.* (1)

[Lord Russell of Killowen referred to *Bethell* v. *Abraham.* (2)]

July 23. The judgment of their Lordships was delivered by

Lord Russell of Killowen. The action in which this appeal arises is an action for the administration of the estate of one Khoo Eu Yong, a merchant of Penang, who will be referred to as the testator.

The testator by his will, dated October 16, 1918, appointed Khoo Heng Poon and Khoo Tek Keong executors thereof. After bequeathing sundry pecuniary legacies and directing the investment of a sum of $10,000 to be applied as therein mentioned, he devised and bequeathed the residue of his estate upon certain trusts (including a trust for the accumulation of surplus income) during a period of twelve years from his death.

The trusts of the residue at the expiration of the period were declared in the following terms: "(*e*) Upon trust as to both the capital and the accumulations for my said wife and my sons Khoo Tek Chye, Khoo Tek Keong and Khoo Lip Sim in equal shares. (*f*) Provided always that in case my said wife shall die before the expiration of the said period of 12 years her share shall go to increase the shares or share of my sons or son who shall survive the said period or leave a child or children living at the expiration of the said period and if more than one in equal shares. (*g*) Provided further that if any of my said sons shall die before the expiration of the said period of 12 years without leaving a child living at the expiration of the said period his share shall go to increase the shares or share of my other sons or son who shall survive the said period or leave a child or children at the expiration of the said period and if more than one in equal shares. (*h*) Provided also that if any of my said sons shall die before the expiration of the said period of 12 years leaving a child or children living

(1) [1905] A. C. 373.

(2) (1873) L. R. 17 Eq. 427.

at the expiration of the said period and such child or children shall stand in the place of such deceased son and take per stirpes and equally between them if more than one the share of my residuary trust fund which such deceased son would have taken if he had been living at the end of the said period including any accrued share or shares under the last two preceding clauses."

The investment clause contained in the will ran thus: "11. I empower my trustees to invest all moneys liable to be invested in such investments as they in their absolute discretion think fit with liberty to vary the same from time to time."

The testator died on January 2, 1919, and his will (with a codicil irrelevant for the present purpose) were proved by the two executors on April 16, 1919. Khoo Heng Poon died on January 11, 1927, leaving the testator's son, Khoo Tek Keong, as sole surviving trustee of the will. Khoo Tek Keong had in fact been also managing trustee. On May 19, 1929, Khoo Sian Tan and Cheah Inn Keong were appointed additional trustees; and on March 2, 1931, they were appointed managing trustees, as from which date Khoo Tek Keong ceased to be a managing trustee, although he continued to be a trustee.

The period of twelve years expired on January 2, 1931, and thereupon in the events which happened the residuary estate belonged to the testator's widow and his three named sons in equal shares.

On April 14, 1931, the writ in the present action was issued (the plaintiffs being the testator's widow and his son, Khoo Tek Chye) against the three trustees, in the Supreme Court of the Straits Settlements (Settlement of Penang). It asked for administration of the estate of the testator with all necessary and proper accounts and inquiries. The statement of claim in para. 9 thereof alleged various breaches of trust, of which it is only necessary to mention those alleged against Khoo Tek Keong, the first defendant namely: "9 (4.).—The first defendant has committed breaches of trust or wilful default in lending out trust funds on

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personal loans on security of jewelleries without valuation. 9 (6.).—The first defendant has committed breaches of trust or wilful default in lending out trust funds to chetties without securities."

During the hearing of the action the plaintiff Khoo Tek Chye died, and his eldest son, Khoo Ee Lay, was substituted as plaintiff.

At the trial it was not in dispute that Khoo Tek Keong (hereinafter referred to as the appellant) had in fact done the acts alleged. The contest was (*a*) whether the acts were breaches of trust, and (*b*) if any of them were breaches of trust, whether he should not be relieved from liability under s. 60 of Ordinance No. 14 of 1929. A further defence was raised to the effect that the plaintiffs were bound by accounts previously delivered, but this point was quite properly not pressed before their Lordships, and no further reference need be made to it.

The trial judge (Whitley J.) held the appellant to be "a perfectly honest trustee." He also held in regard to the acts alleged in para. 9, sub-paras. 4 and 6, of the statement of claim that no breach of trust had been committed, the transactions being covered by the investment clause in the will, and being, moreover, transactions similar to transactions in which the testator was accustomed, in his lifetime, to embark his own moneys. The learned judge then proceeded in his judgment to state that if these transactions had been breaches of trust he would have held that the appellant was entitled to be relieved from liability.

An order (dated May 19, 1932) was accordingly made (1.) declaring that the appellant had committed certain other breaches of trust (irrelevant to this appeal), and that save as therein declared the charges of breaches of trust as set out in the statement of claim had not been proved; (2.) removing by consent the appellant from the trusteeship, and (3.) ordering certain accounts and inquiries. As to costs, the costs of all parties were ordered to be paid out of the estate, but without prejudice to all or any of such costs being directed to be paid out of the share of any beneficiary

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if the trial judge should so direct on the further consideration of the action.

On appeal by Khoo Ee Lay the Court of Appeal held that the transactions alleged in para. 9, sub-paras. 4 and 6, of the statement of claim were breaches of trust, and that the appellant was not entitled to relief under s. 60 of the Ordinance, and they made an order (dated August 31, 1932), the relevant portion of which is in the following terms: "The Court doth order and declare that the respondent committed breaches of trust in making the loans referred to in para. 9, sub-paras. 4 and 6, of the statement of claim and is liable to make good to the estate of Khoo Eu Yong deceased all loss which has already accrued or may hereafter accrue by reason thereof together with interest thereon at the rate of 4 per cent. per annum. And let the judgment appealed against herein be varied accordingly. And the Court doth order that the order as to costs in the Court below do stand, but that the appellant's costs of this appeal be taxed as between solicitor and client and when taxed be paid out of the estate of the said deceased. And the Court doth certify for two counsel for the appellant. And the Court doth make no order as to the costs of the respondent."

Murison C.J. held that the loans on the security of jewellery were breaches of trust on the ground that they were not income-producing loans, and were therefore not strictly investments. He says of the appellant: "He lent money on the security of jewellery. In a way this was a speculation, though a mild one. It gave no income. The only chance of a return was a rise in price, and the opposite happened." This appears to be a misconception of fact on the part of the learned Chief Justice; the loans in fact carried interest. He further held that the loans to chetties upon personal security might, since they produced income, be considered to be investments; but that not being expressly authorized by the investment clause, they were made in breach of trust. He thought that the appellant, although he had acted honestly, had not acted reasonably, and refused to relieve him from liability under s. 60 of the Ordinance.

Prichard J. does not in terms state in his judgment that these two classes of loans were breaches of trust, but it must be assumed that he so held, for his judgment is in substance a refusal to grant relief from liability on the ground that the appellant's conduct in making the loans was neither reasonable nor excusable.

Terrell J. held both classes of loans to be breaches of trust: as to the loans to chetties, on the ground that the investment clause did not expressly authorize loans on personal security; as to the loans on jewellery, because they were made on a valuation made by the appellant himself. The learned judge seems to have been influenced also to some extent by certain considerations which, in view of the trial judge's finding of honesty, might, their Lordships think, have properly been left out of view. He also declined to grant relief to the appellant.

By an order dated January 23, 1933, Oon Kim Lan, the administratrix of the estate of Khoo Tek Chye, and the second respondent to this appeal, was substituted as plaintiff in the place of Khoo Ee Lay. The testator's widow appears to have died during the pendency of this appeal.

After full argument their Lordships find themselves to some extent in agreement, and to some extent in disagreement, with the conclusions of the Appellate Court.

Their Lordships find it impossible, in face of the extraordinarily wide scope of the investment clause, to hold that the loans on the security of jewellery have been proved to be breaches of trust by the appellant. They were loans made upon the security of property and carrying interest; they were accordingly "investments" within the meaning of clause 11 of the will. The absence of an independent valuation at the time of the loan would not per se make such an investment a breach of trust. It would be a breach of trust only if at the time of the loan the security was an insufficient security and therefore an improper security for the trustee to select out of the investments authorized for the investment of the trust estate in his care. In the present case, not only is insufficiency of value at the times

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of the loans not proved; it is not even alleged. The only breach of trust alleged is the lending on the security of jewelleries without valuation. Their Lordships are therefore of opinion that no breach of trust in this regard has been established against the appellant.

As regards the loans to chetties, these stand upon a different footing. Their Lordships agree with the Appellate Court that these do constitute breaches of trust by the appellant, but upon the ground that being loans on no security beyond the liability of the borrower to repay, they are not "investments" within the meaning of clause 11 of the will; they are accordingly dispositions by the appellant of the trust estate wholly unwarranted by the terms of the trust. As to these breaches of trust, their Lordships agree with the view that the appellant has failed to establish any claim to be relieved from personal liability.

Sect. 60 of the Ordinance No. 14 of 1929 is in the following terms: "If it appears to the Court that a trustee . . . . is or may be personally liable for any breach of trust . . . . but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same."

The finding of the trial judge vouches for the appellant's honesty, but he must further establish that he acted reasonably and ought fairly to be excused for the breach of trust. His main contention is that he merely pursued the same course of conduct as the testator had pursued in his lifetime. Their Lordships, so far from finding in this fact grounds for saying that he acted reasonably and ought fairly to be excused for his breaches of trust and relieved from personal liability, view it from the opposite standpoint. It indicates to their minds, and the evidence given by the appellant confirms it beyond doubt, that he never considered the question of these dealings with the trust funds in the light of his duty as a trustee, or paused to consider whether it was prudent for him as a trustee to lend on the

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personal security of the borrowers. "I just followed what my father did," is his sole explanation of his conduct in this respect. In their Lordships' opinion, the appellant ought not to obtain any relief from personal liability for the loss occasioned to the estate by the loans on personal security. To apply the language used by Sir Robert Romer in the case of *Chapman* v. *Browne* (1), the appellant never really considered the question whether these dispositions of the trust funds were such as in their nature it was prudent and right for him as a trustee to make.

One further matter remains to be mentioned. It was contended in the Appellate Court and before their Lordships' Board, that no appeal lies from the exercise by a trial judge of the discretion conferred by s. 60 of the above mentioned Ordinance. The Appellate Court rejected this contention. Actually, no discretion had in fact been exercised by the trial judge in the present case. There was no *decision* to exercise a discretion; there was merely an obiter dictum as to the course which he would have pursued if an event had happened which had not happened. The point did not, and does not, in strictness arise. Their Lordships therefore merely state that without further argument they are not prepared to differ from the views of the Appellate Court in the present case, or from the statement of Cozens-Hardy M.R. in *In re Allsop* (2), where he said: "It is properly matter of appeal."

In the result, the appeal ought in their Lordships' opinion to succeed as to the loans on the security of jewellery, and to fail as to the loans to chetties. The order of the Court of Appeal should be varied by restricting the loans therein mentioned to the loans referred to in para. 9, sub-para. 6, of the statement of claim. Their Lordships will humbly advise His Majesty accordingly.

In regard to costs, since the appellant should have been in a substantial degree successful on the appeal from the judgment of the trial judge, their Lordships think that he might properly be placed on the same footing as to his costs

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(1) [1902] 1 Ch. 785, 805.

(2) [1914] 1 Ch. 1, 14.

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of that appeal with the appellant on that appeal, who should have been only partially successful therein. Accordingly the order of the Court of Appeal must further be varied by inserting therein after the words "the appellant's costs" the words "and the respondent's costs," and striking out the words therein contained relating to the respondent's costs. There will be no order as to the costs of the appeal to His Majesty in Council.

Solicitors for appellant: *Lattey & Dawe.*
Solicitors for respondents: *Herbert Z. Deane & Co.*

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[PRIVY COUNCIL.]

J. C.*
1934
*July* 26.

PATERSON STEAMSHIPS, LIMITED . . APPELLANTS;

AND

CANADIAN CO-OPERATIVE WHEAT PRODUCERS, LIMITED . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC, APPEAL SIDE.

*Canada—Shipping—Bill of Lading—Stranding of Ship—Loss of Cargo—Concurrent Findings—Wheat in bulk—Absence of shifting boards—Unseaworthiness—Water-Carriage of Goods Act* (*R. S. Can.*, 1927, *c.* 207), *ss.* 4, 6, 7.

Wheat was shipped under a bill of lading which incorporated the Water-Carriage of Goods Act (R. S. Can., 1927, c. 207). In the course of the voyage the ship stranded during a gale, and the wheat was lost in consequence. In an action for damages by the owners of the wheat against the shipowners, the trial judge and the appellate Court concurrently found—(1.) that the ship was unseaworthy in that the wheat was loaded in bulk without shifting boards or other precaution to keep it from shifting, and that the shipowners had not exercised due diligence to make her seaworthy; and (2.) that this unseaworthiness was the cause of the loss, in the sense that the master had been apprehensive that the

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* *Present:* Lord Atkin, Lord Tomlin, Lord Macmillan, Lord Wright, and Sir Lancelot Sanderson.

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wheat, so stowed, would shift if he were to put the ship upon her proper course, as that would involve putting her in the trough of the sea, and that for that reason he did not do so, whereas if she had taken the proper course she would have avoided the shoal upon which she stranded :—

*Held*, that the findings were findings of fact and, being concurrent, should not be disturbed ; and that upon them the shipowners were liable under ss. 4 and 7 of the above Act.

The meaning and effect of ss. 4, 6 and 7 of the Water-Carriage of Goods Act considered.

Judgment, Q. R. 55 K. B. 36, affirmed.

APPEAL (No. 72 of 1933) from a judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (March 29, 1933), affirming a judgment of the Superior Court, District of Montreal (May 31, 1932).

The appellants' steamship *Sarniadoc* stranded upon an island in Lake Ontario, and wheat, owned by the respondents and being carried in bulk in the ship, consequently was almost totally lost. The wheat was being carried under the terms, conditions and exemptions from liability contained in the Water-Carriage of Goods Act (R. S. Can., 1927, c. 207).

The respondents brought an action for damages against the appellants in the Superior Court. The trial judge (Demers J.) gave judgment for the plaintiffs, and his judgment was affirmed upon appeal to the Court of King's Bench (Tellier C.J. and Dorion, Rivard, Letourneau JJ. ; Bond J. dissenting).

The facts and the material provisions of the Act above mentioned, together with the concurrent findings arrived at by the learned trial judge and the majority in the appellate Court, appear from the judgment of the Judicial Committee.

1934. July 6, 9, 10. *A. T. Miller K.C.*, *Pilcher*, and *Lynch Staunton* for the appellants.

*Pritt K.C.* and *C. Russel Mackenzie K.C.* for the respondents.

July 26. The judgment of their Lordships was delivered by

LORD WRIGHT. The appellants were sued as the owners of the steamship *Sarniadoc*, which on November 29, 1929, stranded at Main Duck Island at the eastern end of Lake Ontario and became practically a total loss : the respondents sued as owners of a parcel of wheat and barley, being part cargo of the *Sarniadoc* when she stranded, and in the action claimed damages in respect of the loss of the grain consequent on the stranding. The respondents have succeeded before the trial judge and before the Court of King's Bench (in Appeal) for the Province of Quebec, Bond J. dissenting. The appellants now appeal. No question of amount need here be considered.

The respondents' parcel had been transhipped at Port Colborne and was being carried under the terms of a bill of lading which contained the clause "This shipment is subject to all the terms and conditions and all the exemptions from liability contained in the Water-Carriage of Goods Act," that is the Canadian Act of 1910 (1) so entitled ; it will accordingly be necessary to consider the provisions of that Act in relation to the facts of the case.

The *Sarniadoc* was only partially loaded, her actual draft being about 14 feet as compared with a fully loaded draft of 15 feet 6 inches. She had two holds, which cannot have been full of grain. She was bound to Montreal, where it was intended to keep the grain in the holds over the winter. She came out of the Welland Canal at Port Dalhousie and entered Lake Ontario at 2.15 P.M. on November 29, 1929. The master was at first apprehensive of the weather, and thought it was more prudent to take a northerly course in the direction of Toronto, where she might have remained with the cargo over the winter. But about 4.10 P.M., thinking the weather more favourable, he decided to proceed on an easterly course down the lake. At night the weather got worse and the wind increased to a westerly to west-north-westerly gale. The temperature fell to zero, with heavy snow. When passing Peter Point Light about 3 A.M. on November 30, 1929, the master did not succeed in getting a satisfactory bearing, but he proceeded till about 6 A.M., when he reduced speed, being uncertain of his position. He decided, he says in his evidence, to make for Main Duck Island in order to shelter under it, instead of turning at the appropriate position northwards in order to make Kingston, which was on the course for Montreal.

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(1) R. S. Can., 1927, c. 207.

At about 7.10 A.M. the trees of the island were suddenly seen about three-quarters of a mile distant. The master at once put his ship about to beat off the lee shore, but, owing to the force of the wind and sea, the vessel's head fell off, and she stranded on the reef at the northerly end of the island, where she remained fast and broke her back.

At a wreck inquiry held at Toronto on January 9, 1930, the Dominion Wreck Commissioner, sitting with two nautical assessors, found that the master was in default, and that the stranding was caused by his default; it was found that from the outset proper and ordinary judgment was not exercised.

At the trial, the master, in his evidence, was not prepared to say that the ship was seaworthy, and when challenged to explain why he kept on an easterly course instead of turning on a northerly course to Kingston, gave answers which were susceptible of the meaning that he did not do so because he knew the cargo might be liable to shift and he was accordingly afraid to turn the ship on a course which would put her in the trough of the sea, though he also said that he decided to seek shelter because of bad weather conditions and poor visibility.

The circumstances of the loss appear to be somewhat peculiar, but their Lordships have come to the conclusion that for the purposes of this appeal they must accept the concurrent findings of fact arrived at by the trial judge and by the majority of the appellate Court. These findings may be summarized as being (1.) that the ship was unseaworthy in that the grain cargo was loaded in bulk and without shifting boards or other precautions to keep it from shifting, and that the owners had not exercised due diligence to make her seaworthy, and (2.) that this unseaworthiness was the cause of the loss, in the sense that the master had been apprehensive that his cargo, stowed as it was, would shift if he were to put the vessel on the proper course, which would have involved putting her in the trough of the sea, and for that reason did not do so, whereas if he had felt able to take that course he would have cleared the shoal on which he stranded. The finding of the Court below on this point was that there was in a sense bad navigation, but the navigation was justified by the master's

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legitimate fears. Rivard J. thus sums up the position: "Car il ne semble pas douteux que l'échouement du *Sarniadoc* fut le résultat d'une manoeuvre erronée en soi, mais que le maître dut adopter, parce que la marche normale du vaisseau l'aurait mis au creux de la lame, avec danger de désarrimage des grains. Le naufrage et une perte totale auraient pu résulter d'un désarrimage dans ces conditions; la manoeuvre adoptée pour éviter ce désastre a causé l'échouement. Erreur de navigation, mais justifiée, chez le maître, par la crainte d'un désarrimage possible et qui en effet devait être prévenu." (1)

The view of the case which found favour with Bond J., who dissented in the appellate Court, was that the stowage of the grain did not render the vessel unseaworthy, but that the loss was due to errors in navigation which, in his view, seem to have mainly consisted in the action of the master in proceeding down the lake in heavy weather with snowstorms without verifying his position by means of accurate bearings or soundings, until he suddenly found himself about three-quarters of a mile off Main Duck Island; the action he then took was not in the view of the judge "influenced to any appreciable extent by a consideration of the likelihood of the cargo shifting." On this view of the facts, which seems to represent the case principally relied on by the appellants, Bond J. held that the appellants were entitled to succeed under the Water-Carriage of Goods Act. But the trial judge and the majority of the appellate Court, having found that the loss was caused by unseaworthiness, held that the provisions of the Act rendered the appellants liable.

Their Lordships regard these findings of the Courts below as findings of fact. It is true that in some cases a finding that a ship was unseaworthy may be a mixed finding of fact and law; thus in *Elder, Dempster & Co., Ld.* v. *Paterson, Zochonis & Co., Ld.* (2), where the facts were not in dispute, it depended on construction of law whether these facts amounted to bad stowage or to that type of unseaworthiness which does not endanger the ship, but involves damage to the cargo in her. In the present case, however, the question was whether

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(1) (1933) Q. R. 55 K. B. 36, 38.

(2) [1924] A. C. 522.

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the loading of the grain without any precaution to guard against shifting, particularly where the holds were not fully loaded, endangered the safety of the vessel and made her unfit for the adventure as a ship. That was a question of fact. Equally it was a question of fact whether due diligence had been exercised to make the vessel seaworthy : the answer did not depend on the construction of any legal regulation ; it was agreed that the standard of the duty which applied in the case of the *Sarniadoc*, which was registered in Great Britain, was to be found in s. 452, sub-s. 1, of the Merchant Shipping Act, 1894 ; all that is required by that section is that all necessary and reasonable precautions should be taken in order to prevent the grain cargo from shifting : what was necessary and reasonable in all the circumstances of the case, including the practice alleged by the appellants to prevail in the Canadian Lakes grain trade to do nothing but level off the grain in the hold, could only be determined as an issue of fact. Equally was it a question of fact whether the unseaworthiness found to exist did or did not cause the casualty. It cannot properly be said that the causation which the judge found to have operated was too remote in law.

This Board has said in a judgment delivered by Lord Dunedin in *Robins* v. *National Trust Co.* (1), on an appeal from the Supreme Court of Ontario, that it is not a cast-iron rule that the Board will not " examine the evidence in order to interfere with the concurrent findings of two Courts on a pure question of fact." The rule is one of conduct which the Board has laid down for itself, and is not a rule based on any statutory provision. Their Lordships in the present case can discover no error in law which could vitiate the findings, still less anything that could be said to involve a miscarriage of justice. The loss of this vessel is somewhat difficult to explain, even allowing for the storm and the bad visibility. A plausible suggestion that she was lost because of deficient engine power, that is, another form of unseaworthiness, has been unanimously rejected by all the judges below, and was not even argued before their Lordships. There remain the rival findings of

(1) [1927] A. C. 515.

Bond J. on the one side and of the other judges on the other. Their Lordships can see no ground whatever in all the circumstances of this case for interfering with the concurrent findings of both the Courts which have considered the matter.

To determine how these findings affect the obligations of the parties, it is necessary to examine the terms of the Water-Carriage of Goods Act, 1910, which is incorporated in the contract under which the grain was being conveyed. The terms of the Act have been the subject of argument before this Board, and must now be considered. Except for a decision of this Board in *Royal Exchange Assurance Corporation* v. *Kingsley Navigation Co., Ld.* (1), there is apparently no authority on its construction : at least their Lordships have not been referred to any, and they have not themselves been able to find any. The Act, however, has a certain kinship with similar legislation in other countries on the same subject-matter, in particular, with the United States Harter Act, 1893, and the later Acts, the New Zealand Sea Carriage of Goods Act, 1922, and the British Carriage of Goods by Sea Act, 1924, with which in substance the Australian Act of 1924 is identical. These Acts differ in general scheme and framework from the Canadian Act, but in certain respects decisions under them may be helpful in construing the Canadian Act. And all these Acts agree in this respect, that they superimpose statutory restrictions on the freedom possessed by the shipowner at common law to restrict his liability as carrier, and at the same time give him the benefit of statutory provisions in his favour. These Acts accordingly cannot be understood or construed except in the light of the shipowners' common law liability and the usual methods of limiting that liability previously in vogue.

It will therefore be convenient here, in construing those portions of the Act which are relevant to this appeal, to state in very summary form the simplest principles which determine the obligations attaching to a carrier of goods by sea or water. At common law, he was called an insurer, that is he was absolutely responsible for delivering in like order and condition at the destination the goods bailed to him for carriage. He

(1) [1923] A. C. 235.

could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King's enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable : the list of these specific excepted perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognized that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings, or implied obligations. If then goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier.

In the concise words of Willes J. (in *Notara* v. *Henderson* (1)) : " the exception in the bill of lading . . . . only exempts him [the shipowner] from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care . . . ." Willes J. is there referring to what may be called the specific excepted perils. The position is thus summed up by Lord Sumner in *F. C. Bradley & Sons, Ld.* v. *Federal Steam Navigation Co., Ld.* (2) : " The bill of lading described the goods as ' shipped in apparent good order and condition ' . . . . , it was common ground that the ship had to deliver what she received as she received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

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(1) (1872) L. R. 7 Q. B. 225, 235.
(2) (1927) 27 Ll. L. Rep. 395, 396.

But negligence and unseaworthiness of the carrying vessel might generally, by British law, be excepted by express words; in such a case, though the exception of perils of the sea (to take an instance) might not per se for the reasons stated on the facts, avail the carrier, yet he could rely on the exception of negligence or of unseaworthiness, as the case might be, when negligence or unseaworthiness had caused or contributed to the loss. One important object of the Acts under consideration was to limit the use of these general exceptive clauses.

The Canadian Act can now be considered, so far as material, in the light of these simple rules, simple in themselves, though in application involving many difficult refinements. Sect. 4 consists of prohibitions; the section recognizes and enforces the fundamental obligations which have just been explained, and then goes on to enact that any clause, covenant or agreement which weakens or relieves against them is illegal and void unless it is in accordance with the other provisions of the Act.

It is, for present purposes, in ss. 6 and 7 that these provisions are to be found.

Sect. 6 deals with the question of negligence and latent defect: it is limited so far as concerns negligence to "faults or errors in navigation or management of the ship": the meaning of these words (or of analogous words) in the Carriage of Goods by Sea Act, 1924, was discussed in *Gosse Millerd, Ld.* v. *Canadian Government Merchant Marine, Ld.* (1), where they were held not to be wide enough to cover matters involving simply a failure to take care of the cargo. What is important to note in s. 6 is that the protection is conditional on the owner having exercised due diligence to make the ship seaworthy. At common law, seaworthiness of the ship in a contract for sea carriage has, if necessary, to be shown to have existed at the commencement of the voyage, but unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of: *J. & E. Kish* v. *Charles Taylor, Sons*

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(1) [1929] A. C. 223.

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*& Co.* (1); but the obligation to provide a seaworthy ship is absolute, and is not limited to due diligence to make it so. The matter which s. 6 deals with as the condition on which its privileges may be relied on is not seaworthiness, but due diligence to make the ship seaworthy: if, however, that condition is not fulfilled, the shipowner cannot, under s. 6, excuse himself from liability for loss due to negligence in the respects specified in the section. What is meant in the (British) Sea Carriage of Goods Act by due diligence to make the ship seaworthy was discussed in *W. Angliss & Co. (Australia) Proprietary* v. *P. & O. S. N. Co.* (2); it is not limited to personal diligence on the part of the owner. The Act does not in terms say that there shall not be implied in any contract of sea carriage the absolute undertaking to provide a seaworthy ship, but it would, for practical purposes, seem to effect the same result, subject to the condition by the last words of the section "or from latent defect." The view that the whole section is subject to the condition of due diligence to make the vessel fit is supported by *McFadden* v. *Blue Star Line* (3) and by the case in the Supreme Court of the United States, *The Carib Prince* (4), which dealt with analogous provisions in the Harter Act.

It follows that on this construction of the section the findings of fact of Bond J. would entitle the appellants to succeed, as indeed the judge held. It is true that though he finds the ship was seaworthy, he does not seem expressly to find that the owners had exercised due diligence to make her so, which is the essential finding under the section, and theoretically might be a different matter: but no doubt that finding was implied. The fault or neglect he finds to have caused the loss was a fault in navigation.

But apart from the case of latent defect, s. 6 has said nothing about unseaworthiness causing the loss, nor does it cover any case of negligence not falling within its precise and limited terms. It is then to s. 7 that resort must be had in order to determine the legal effect of the findings of fact of the Courts

(1) [1912] A. C. 604.
(2) [1927] 2 K. B. 456.
(3) [1905] 1 K. B. 697.
(4) (1898) 170 U. S. 655.

below, that is that the cargo was lost owing to the ship being unseaworthy. Even if the Court do not find whether or not due diligence was exercised to make her seaworthy, that finding is clearly implied : the bad stowage, on its face, must have involved the fault or neglect of the owners or of their responsible servants or agents. There is no question of latent defect.

The words of s. 7 which are material to this case are : " the ship, the owner, charterer, agent or master, shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies . . . . or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees " : their Lordships disregard the intervening words which deal with matters such as inherent vice of the goods or delays or deviation, the last named exception being somewhat difficult to construe.

The first words of the section contain a limited number of specific perils which are thus sanctioned by the Act. It is, however, clear that these exceptions will not per se protect the shipowner in respect of a loss caused by negligence or by unseaworthiness, and up to this point the shipowner will not be relieved from liability, unless the negligence is excused by s. 6 or the unseaworthiness is a latent defect also within s. 6. These exceptions do not cover the whole scope of the general obligations of the carrier, at common law or as set out in s. 4. Thus, in the present case, the stranding was plainly a peril or danger of the sea, and in that sense the loss of the cargo was due to a danger of the sea. But it was also caused by unseaworthiness, of such a character that it could not be described as a latent defect. On the principles already stated, the statutory exception of dangers of the sea does not in this case relieve the shipowner from liability : if he is to escape liability he can only find protection in the final sentence of s. 7, which must next be construed.

In form the sentence is purely negative : " the owners, etc., are not to be liable for loss arising without the actual fault or privity, or without, etc." It is clear that the second

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"or" here must be read as "and": this was so held in *Gosse Millard's* case by the trial judge (1), a ruling not questioned in the House of Lords (supra). To avoid liability, the fault or neglect must not be that of either the shipowner or of any of the responsible persons who are enumerated. The negative form is appropriate because the words are intended to exclude what would otherwise be a liability for the loss. It may be questioned whether the shipowner can invoke these general words, unless the case is first brought within the specific exceptions set out in the earlier part of the section, and thereupon issues of negligence or unseaworthiness have fallen to be dealt with: it is not here necessary to decide this question, though the mode in which the analogous case of contractual exceptions has been dealt with, seems to suggest that the question should be answered in the affirmative: see Lord Macnaghten in *The Xantho*. (2) If these general words were to be read irrespective of the particular exceptions which precede them in the section, it is difficult to see why these particular exceptions are stated at all: the general words would suffice to cover by themselves, every case in which the shipowner could claim exemption from liability under s. 7 for any loss due to the excepted perils.

What then is the precise effect of these words? The phrase "actual fault or privity" seems to be taken from s. 502 of the Merchant Shipping Act, 1894, which relates to "fire." It has been held under that section that if the shipowner proves absence of actual fault or privity, he is exempted from loss, even if due to unseaworthiness: *Lennard's Carrying Co., Ld.* v. *Asiatic Petroleum Co.* (3): that decision was applied in the construction of the same words in s. 7 by this Board in *Royal Exchange Assurance Corporation* v. *Kingsley Navigation Co., Ld.* (4), where the loss was by fire: as the fire was the result of unseaworthiness, the shipowners, not having established absence of actual fault or privity, were held to be liable. The meaning of the words was thus explained by

(1) [1927] 2 K. B. 432, 435.
(2) (1887) 12 App. Cas. 503, 515.
(3) [1915] A. C. 705.
(4) [1923] A. C. 235.

Hamilton L.J. (as he then was) in *Lennard's* case (1): "actual fault negatives that liability which arises solely under the rule of 'respondeat superior.'" But as a matter of grammar the word "their" in s. 7 relates back to the enumeration of persons at the beginning of the section and thus includes the actual fault or privity of the owner, charterer, agent or master, which is a much wider category than that under s. 502 of the Merchant Shipping Act: this may raise a question in the case of a loss by fire whether s. 7 does not in this respect, and also by its reference next following to agents, servants and employees, put a heavier burden on the shipowner than s. 502 of the Merchant Shipping Act, so as to be pro tanto inconsistent with that section. No such question, however, arises in this case. The general exception at the end of s. 7 is obviously not limited to unseaworthiness, but goes to all cases apart from those covered in s. 6, in which due care on the part of the enumerated persons is material to the due performance of the contract.

Now the general words go beyond the category of owner, etc., and deal with "the fault or neglect of their agents, servants or employees." But as regards unseaworthiness since the words "actual fault or privity" on the authorities quoted are to be construed as applying even to unseaworthiness, it seems that the words which follow must also receive the same effect, with the result that if, but only if, the shipowner is able to exclude the actual fault or privity or the fault or neglect of the various persons enumerated, he will be able to relieve himself from liability for loss due, among other things, even to unseaworthiness, though the extent of that relief may be limited to cases where the loss is caused also by some one of the excepted perils specified in the earlier part of the section. The operative obligation to provide a seaworthy ship is thus under the Act reduced, even when unseaworthiness causes the loss, to an obligation which may be compendiously described as an obligation to use due diligence to make the ship seaworthy.

In the present case, it is clear that the ship was, according

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(1) [1914] 1 K. B. 419, 436.

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to the findings of the Courts below, not merely unseaworthy but unseaworthy in such a way as necessarily to involve some fault or failure within the final words of s. 7. Such a finding, if not express, is obviously to be implied. Hence the appellants cannot avail themselves of the exception of dangers of the seas, though these dangers caused the loss, because they cannot show in respect of the unseaworthiness, which was also a cause of the loss, and indeed the real cause of the loss, that it existed under conditions entitling them to the benefit of the general words of exception at the end of the section.

The appeal in their Lordships' judgment should be dismissed with costs. They will humbly so advise His Majesty.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Middleton, Lewis & Clarke.*

[PRIVY COUNCIL.]

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*July* 12.

CANADIAN ELECTRICAL ASSOCIATION AND OTHERS . . . . . . . APPELLANTS;

AND

CANADIAN NATIONAL RAILWAYS AND OTHERS . . . . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Canada—Railways—Powers of Railway Board—Electric lines and cables along and across railways—General Order of Board—"Terms and conditions"—Order indemnifying Railway Company—Property and Civil Rights—Railway Act* (*R. S. Can.*, 1927, *c.* 170), *s.* 372.

By s. 372 of the Railway Act of Canada the Board of Railway Commissioners, when granting the leave thereby required to construct or maintain telegraph or telephone wires or appliances, or electric power cables, along or across a railway, may order

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* *Present:* LORD BLANESBURGH, LORD WARRINGTON OF CLYFFE, LORD ATKIN, LORD MACMILLAN, and LORD ALNESS.

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on what "terms and conditions" the work may be executed; and leave is not to be necessary when works have been, or are to be, constructed or maintained by consent, and in accordance with general orders approved by the Board for that purpose.

Acting under the above section, the Board issued a general order (No. 490), which provided by clause 2: "The applicant shall, at all times, wholly indemnify the company owning, operating, or using the railway from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the applicant's wires or cables or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere":—

*Held*, that the effect of the above clause of the order was merely that the applicants were to indemnify the railway company against claims, maintainable by third parties against the company under the general law, by reason of the existence of the authorized works; and that so construed it was within the competence of the Board of Railway Commissioners.

The Parliament of Canada, for the purpose of securing effective railway administration, may encroach upon the Provincial domain in respect of property and civil rights, but Parliament does not appear to have delegated that legislative power to the Board of Railway Commissioners, unless possibly by s. 34, sub-s. 3, of the Act.

*Quære*, whether s. 39 of the Act can be treated as supplemental to s. 372.

Judgment of the Supreme Court of Canada, [1932] S. C. R. 451, affirmed.

Appeal (No. 26 of 1933) by special leave from a judgment of the Supreme Court of Canada (March 31, 1932).

The appeal was as to the validity of a general order, dated February 20, 1931, and made by the Board of Railway Commissioners in exercise of their powers under s. 372 of the Railway Act (R. S. Can., 1927, c. 170). The order prescribed conditions under which electric telegraph and telephone wires, electric power cables, and other electrical appliances, might be carried along or across a railway, otherwise than by the railway company owning or controlling the railway.

The Railway Board, upon an application under s. 52, sub-s. 3, of the Act, granted the applicants leave to appeal to the Supreme Court of Canada upon the question whether the order was within the jurisdiction of the Railway Board.

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That Court by a majority (Duff, Lamont and Smith JJ.; Rinfret and Cannon JJ. dissenting) held that the Railway Board had jurisdiction. The appeal is reported at [1932] S. C. R. 451.

1934. March 15, 16. *Pritt K.C.* and *Frank Gahan* for the appellants.

*Tilley K.C.* for the respondents.

July 12. The judgment of their Lordships was delivered by

LORD BLANESBURGH. This is an appeal by special leave from a majority judgment of the Supreme Court affirming the legality of a regulation of the Board of Railway Commissioners of Canada propounded by a majority vote of that Board. The difficulty of the question raised may be properly gauged, in this instance, by the divergence of administrative and judicial opinion already manifested with reference to it. Its widespread importance to electrical power companies and similar organizations throughout Canada on the one hand and to the Dominion railways on the other may in like manner be judged by the widespread and representative interests of the parties to the dispute. There are ranged on one side as appellants, first, the Electrical Association of Canada, with a membership comprising public utility companies engaged in the production and transmission of electrical power for commercial and private consumption throughout the whole Dominion, all of them, whether incorporated under Dominion or Provincial legislation, having full charter or statutory powers to erect and maintain the overhead transmission lines necessary for the distribution of their power. As second appellants there appear the Hydro Electric Power Commission of Ontario, a provincial government commission similarly engaged in the production and transmission of electrical power. Against these appellants are to be found as respondents the Canadian National Railways, the Canadian Pacific Railway Company, the Michigan Central Railroad Company and the Railway Association of Canada. The contest, indeed, is one between two sets of public utility

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organizations, Dominion wide in their operations, and it concerns the adjustment of rights and liabilities between them in respect of a matter of great importance to both: that is to say, in respect of the wires for the transmission of electricity for light, power or other purposes carried by the appellants and other like undertakers along or across the lines of the Dominion railways.

Under the Dominion Railway Act it is the Railway Commissioners to whom is assigned the duty of dealing with applications by power companies and others for licences to carry their wires along or across the lines of the railways under their jurisdiction. Without such a licence and in the absence of such agreement as is permitted by the Act no such wires may be lawfully so carried. It has been the practice of the Commissioners to issue general orders containing regulations with reference to this matter. One such general order—(No. 231)—was promulgated by them in 1918. This order was in 1920 amended by another, numbered 230; and on February 20, 1931, was further amended by general order, numbered 490, containing the regulation with reference to which the present question arises. The strongest exception to this new regulation is taken by the appellants. The Commissioners have thereby, they complain, sought to impose upon every successful applicant for a licence to carry overhead electrical wires across or along a railway a liability to the railway company concerned both oppressive and exceptional. The question they raise is whether the imposition of such a liability by such a regulation can legally be justified by reference to any powers of the Commissioners under the statute.

The appellants questioned the legality of the regulation when its publication was under consideration. On its promulgation they were given leave by the Commissioners to refer the question of its legality to the Supreme Court to which in due course this question was propounded: "As a matter of law had the Board jurisdiction to make general order No. 490 dated February 20, 1930?"

To that question as has already been indicated the Supreme

Court in a judgment delivered on March 31, 1932, by a majority returned an affirmative answer. Hence the present appeal.

It will be found that although the question put to and answered by the Supreme Court was quite general in its terms, the particular regulation of the order which has already been referred to and is set forth below, was then and is now alone in question. The competence of the Board in regard to the other provisions of a very elaborate general order has not been challenged.

Until another view was suggested in the course of the argument at their Lordships' Bar, it has been generally assumed that the existing powers of the Railway Commissioners in this matter are derived exclusively from s. 372 of the Railway Act, 1919. That section with modifications, here immaterial, has had its place in all Railway Acts for many years, and, as it is certainly the main source of the Commissioners' powers, it is convenient to set forth its provisions at once :—

" 372. Lines, wires, other conductors, or other structures or appliances for telegraphic or telephonic purposes, or for the conveyance of power or electricity for other purposes, shall not, without leave of the Board, except as provided in sub-section five of this section be constructed or maintained

(*a*) along or across a railway by any company other than the railway company owning or controlling the railway ; or

(*b*) across or near other such lines, wires, conductors, structures or appliances, which are within the legislative authority of the Parliament of Canada.

2. Upon any application for such leave the applicant shall submit to the Board a plan and profile of the part of the railway or other work proposed to be affected, showing the proposed location and the proposed works.

3. The Board may grant the application and may order the extent to which, by whom, how, when, on what terms and conditions, and under what supervision, the proposed works may be executed.

4. Upon such order being made the proposed works may

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be constructed and maintained subject to and in accordance with such order.

5. Leave of the Board under this section shall not be necessary for the exercise of the powers of a railway company under s. 367 of this Act, nor for the maintenance of works now authorized, nor when works have been or are to be constructed or maintained by consent and in accordance with any general orders, regulations, plans or specifications adopted or approved by the Board for such purposes."

Before their Lordships proceed to a closer examination of this section in its relation to the problem presented by the new regulation, they may conveniently interpolate one or two general observations as to its structure. It will be noticed that the section, while including within its range applications for leave to construct and maintain across or along a railway electrical lines so diverse as a telephone wire at one end of the scale and a power cable at the other end, deals with all by a form of words made applicable to each indifferently, and whether the structure, be it what it may, is to be situate in a remote corner of the Dominion or in the midst of a crowded urban area. The section nevertheless does not fail to discriminate in a way between what is serious and what is trivial. The railways, as was said in a judgment now over 20 years old, *Maritime Telegraph & Telephone Co.* v. *Dominion Atlantic Ry. Co.* (1), stretching, as they do, over the whole country, of necessity must be crossed from time to time by innumerable telephone and telegraph wires, and to a lesser extent by the wires of electrical power and light companies. It can hardly be doubted that the framers of the section recognized the existence of that state of things, and intended to provide for it. All public utilities must be served, railways not more than others, and the fact that under the section the Commissioners are not in set terms empowered to refuse an application made to them, seems at least to justify the judicial view expressed in the same report, that the issue on every such application must always be how the crossing can properly and safely be made in the particular circumstances of the case under consideration. This necessary distinction of circumstance between one application and another, a distinction to which it may be due regard has not always been had, is in the section revealed, as their Lordships think, by the contrast between " the terms and conditions " of sub-s. 3, on which the execution of any particular proposed works may be permitted, and the " general orders, regulations, plans and specifications " which, under sub-s. 5 are to be adopted and approved by the Board. The " terms and conditions " are those specifically appropriate to the particular case: the " general orders etc." such as are in their terms appropriate either to every case or to specified classes of cases. Accordingly, provided that the provisions of the general order applicable are recognized and observed, the section leaves it to the parties concerned, if they can agree, themselves to fix the terms and conditions upon which particular lines may be carried along or across a railway without either application to or intervention by the Commissioners.

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(1) (1916) 20 Can. Ry. Cas. 213.

Now is it possible to find in this any limitation relevant to the present inquiry in the permitted scope of these general orders? It is convenient to put and to seek to answer this question while the section itself is immediately under notice, for the regulation now challenged is contained in a general order promulgated by the Commissioners under this very section, a fact which their Lordships have verified by reference to a full print of the order with which they have been courteously supplied since the hearing.

The question is not easy to answer, so unqualified are the powers of the Commissioners in this matter. But it may perhaps be hazarded that the permission extended to the companies concerned to agree as to the terms and conditions referred to suggests that the general order, which overrides agreement, is not intended to deal ex cathedra with questions which the companies concerned are in such matters left free to adjust for themselves. But is the question immediately relevant now, that of the liabilities inter se resulting from the placing of a company's wires along or across a railway

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one of the matters capable of being adjusted by agreement? There is much to be said for an affirmative answer. A railway company is permitted by sub-s. 1 (*a*) of the section to carry its own wires over its own lines without control or interference by the Commissioners. For these wires the liability must be exclusively its own. There is no one else on whom it can be laid. Again, under sub-s. 5 the leave of the Board is not required for the exercise by a railway company of its powers under s. 367 of the Act, and under that section the company may lease its own telegraph or telephone lines to any companies having telegraph or telephone powers. Quite obviously, it would seem all questions of liability in respect of such lines leased will fall to be regulated by the provisions of the lease and these are left at large. It is however only an inference or by way of analogy that a similar freedom of contract may be presumed to exist where under this sub-section by consent the wires of a company are carried across a railway line, and even if apart from regulation this freedom does exist, their Lordships are not prepared to hold that it may not be controlled by regulations of the Commissioners if thev are minded to make them.

The question remains whether a regulation to the same effect may not also be a lawful term or condition imposed under sub-s. 3. To that question, to which on the appeal the main argument has been addressed, their Lordships will come in due course. They proceed now to a closer examination of the terms of the impugned regulation.

The general order in which it is to be found is a republication with amendments of the general orders already referred to. The frame of the original orders remains unaltered: and the only amendment of substance introduced into them is that to which exception is now taken. In order to appreciate the full effect of the amendment it will be convenient first to quote the introductory provisions, Nos. 1 and 3 of the order, which have stood unaltered throughout:—

"1. That the conditions and specifications set forth in the schedule hereto annexed under the heading 'Rules for wires erected along or across railways' be, and the same are hereby

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adopted and confirmed as the conditions and specifications applicable to the erection placing and maintaining of electric lines wires or cables along or across all railways subject to the jurisdiction of the Board, part 1 being applicable where the line or lines, wire or wires, cable or cables, is or are carried along or over the railway: part 2 being applicable where the line or lines, wire or wires, cable or cables is or are carried under the railway.

3. That any order of the Board granting leave to erect place or maintain any line or lines, wire or wires, cable or cables, along or across any railway subject to the jurisdiction of the Board shall, unless otherwise expressed, be deemed to be an order for leave to erect place and maintain the same according to the conditions and specifications set out in that part of the said schedule applicable thereto, which conditions and specifications shall be considered as embodied in any such order without specific reference thereto, subject, however, to such change or variation therein or thereof as shall be expressed in such order."

It is made plain by these introductory provisions that the order applies to every kind of electric line wire or cable, and also, what is perhaps for present purposes more important, that while the order is of general application power is reserved to vary its provisions so as to meet the circumstances of any particular case.

The regulation now in question is inserted as condition 2 of Part I. of the schedule relating to overhead wires in place of the same condition as it formerly stood. Conditions 1 and 2 prior to the amendment now challenged of condition 2 were as follows:—

" 1. The applicant shall at its or his own expense, erect and place the lines, wires, cables or conductors authorized to be placed along or across the said railway and shall at all times at its own expense maintain the same in good order and condition and at the height shown on the drawing, and in accordance with the specifications hereinafter set forth so that at no time shall any damage be caused to the company owning, operating or using the said railway, or to any person lawfully upon or using the same, and shall use all necessary and proper care and means to prevent any such lines, wires, cables or conductors from sagging below the said height.

2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against all loss, cost, damage, and expense to which the said railway company may be put by reason of any damage or injury to persons or property caused by any of the said wires or cables, or any works or appliance herein provided for not being erected in all respects in compliance with the terms and provisions of this order, as well as any damage or injury resulting from the imprudence, neglect, or want of skill of the employees or agents of the applicant."

It is explained by the Commissioners in the judgment propounding their substituted regulation that the railway companies were dissatisfied with these conditions as not sufficiently protective. They complained that while power companies were required under condition 1 to maintain their lines in good order, they were not compelled to indemnify the railway companies against loss occasioned them by failure of the power companies to maintain the lines in such good order. The railway companies moreover had persistently put it forward as their view that the conditions should provide for their indemnification not only in the circumstances already provided for, but for loss or damage however caused. It then appears from the judgment that the railway companies having stated their position as just detailed would have been content with a regulation in place of condition 2, framed as follows :—

" 2. The applicant shall at all times wholly indemnify the company owning, operating or using the said railway of, from and against any loss, cost, damage and expense to which the said railway company may be put by reason of any damage or injury to person or property caused by any of the said wires or cables or any works or appliances herein provided for not being erected *and at all times maintained* in all respects in compliance with the terms and provisions of this order as well as any damage or injury resulting from the imprudence,

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neglect or want of skill of the employees or agents of the applicant.''

As will be seen this is the original condition 2, with the addition of the words italicized " and at all times maintained,'' and had it been accepted by the Commissioners the present controversy could not have arisen. But it was not accepted, and the explanation by the Commissioners of the condition finally promulgated by them is to be found in this concluding passage of their judgment:

" Regarding as vitally essential the safety of persons outside the circle of either company, and desiring to frame conditions most likely to ensure to them immunity from danger and loss, the Board is of opinion that this result can be best assured by placing upon the shoulders of the company carrying a dangerous load across the right of way, a primary obligation to bear it safely across the railway property, unless the negligence of the latter company should operate to cause the power wires to spill their load.

If, therefore, an accident or disability occur due to an escape of electric power and for any reason its cause cannot be definitely located as between the railway company and the power company, the latter should be held responsible for the reason that the loss suffered will have been occasioned by the passage of the power company's wires over or along those of the railway company. If they had not been there the occurrence would not have taken place. The conditions of carrying the power companies' lines across or along the railways should be framed in accordance with what is above stated, that is to say, except in cases where loss or damage to the railway company is directly attributable to any act, default or negligence on the part of such railway company, its agents or employees, the applicant shall at all times wholly indemnify the company owning, operating or using the railway, from and against all loss, cost, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the said applicant's wires or cables or any of the works herein provided for by the terms and provisions of this

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order, as well as against any damage or injury resulting from the imprudence, neglect or want of skill of the employees or agents of the applicant unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere.

In result, therefore, paragraph 2 of the

## STANDARD CONDITIONS AND REGULATIONS FOR WIRE CROSSINGS.

### Part I.

### Over-Crossings.

'Conditions' will be amended to read as follows":

And then follows the condition, the legality of which is now impugned:—

"2. The applicant shall, at all times, wholly indemnify the company owning, operating or using the railway from and against all loss, damage, injury and expense to which the railway company may be put by reason of any damage or injury to persons or property caused by any of the applicant's wires or cables or any works herein provided for by the terms and provisions of this order, as well as against any damage or injury resulting from the imprudence neglect or want of skill of the employees or agents of the applicant, unless the cause of such loss, cost, damage, injury or expense can be traced elsewhere."

It will be noticed that this condition, as actually promulgated while in other respects reproducing textually the words of the oral judgment introducing it, omits the words of exception which their Lordships have underlined above. It is a striking omission, not easy to account for in view of the attitude before the Commissioners of both parties to the dispute and it derives an added importance from the fact that the concluding words of the condition, "unless the cause of such loss cost damage injury or expense can be traced elsewhere," words which possibly have some relation to the subject-matter of the exception, may themselves on a strict construction be quite otiose. For by the condition an applicant is only made liable for damage or injury "caused" by any of his wires or cables and, literally read, the concluding words say no

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more than that he is not to be liable if the damage or injury is not so "caused." It will be noted also that although in the course of the judgment it is made clear that the amendment of the original condition as asked for by the railways was confined to the wires and cables of power companies and its acceptance was justified by the Commissioners with reference to their wires and cables only, still the condition, as promulgated, extends to all wires covered by the section, that is to say, to telegraph and telephone wires, as well as the wires of the power companies.

It does not seem however that the legality of the condition as actually amended,—the aspect of it with which their Lordships are alone concerned—is affected by either of these things. It must remain with the Commissioners, should they deem it necessary, to expound its meaning or by amendment to clarify its terms if and when the occasion arises for their so doing.

The construction placed by the appellants upon the new condition is very far-reaching. The amended condition, they say in their printed case: "purports to create in the place of a mere liability for damage caused either by breach of the terms and conditions of the Order or by negligence of the power companies a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the power lines. . . . A burden," they add later, "which the power company is not called upon to bear under the general law in force in any of the Provinces of Canada with respect to responsibility for damages."

As has been seen, the appellants need not have confined this statement of theirs to power companies and power lines. The condition, as has been observed, extends to all applicants and to all their electric lines. Can it as so construed be justified as one of the "terms and conditions" by which the acceptance of a particular application may be accompanied? Upon this their Lordships would say at once that the dispensing power reserved to the Commissioners by cl. 3 of the General Order already quoted, so that the condition may or may not be made applicable in any particular case, enables them to treat it as a " term " or " condition " within the meaning of the section. As such then is it legal ?

Now the words " terms and conditions " are in constant use throughout the Act. In some instances, as, e.g., ss. 39, 202, 256, sub-s. 3 (*a*), they are qualified by words of explanation or limitation. Here they are quite general. In such a case their true construction must be arrived at by reference to the principles thus enunciated by Romer L.J. in *West Midlands Joint Electricity Authority* v. *Pitt* (1), where he says : " But there are an almost infinite variety of terms and conditions, and the question whether or not these words include in any particular case some particular kind of term or condition must depend upon the context in which they are used." Similarly by Lord Macmillan when delivering the judgment of the Board in *Canadian Pacific Ry. Co.* v. *Toronto Transportation Commission* (2) he says : " where the matter is left so much at large, practical considerations of common sense must be applied, especially in dealing with what is obviously an administrative provision."

Now, in their Lordships' judgment the powers of the Commissioners under this section are, at least primarily, purely administrative. As already observed, it is not without significance that in the section—differing from, for example, s. 151 and s. 373, sub-s. 4, of the Act—the Commissioners are not in set terms given power to refuse applications made to them : the works they are empowered to authorize are from their nature as necessary in the interests of the public as is the working of the railways themselves, and the implication of the section appears, not obscurely, to be that if by the imposition of appropriate terms and conditions in regard to the execution of the works such ends as the safety of persons using or being upon the railway and the convenience of its working can be secured or safeguarded, then the works are to be authorized. All the specific provisions of the section are in accord with this view of it. These show it to be a construction section. Every applicant is to submit a plan of the location showing the proposed works : the Commissioners

(1) [1932] 2 K. B. 1, 55, 56.

(2) [1930] A. C. 686, 697.

by their order are to prescribe the extent to which these works may be executed, by whom, when, and under whose supervision; while, most significant, perhaps, of all in its relation to the present question, is the enactment of sub-s. 4 that after the Commissioners' order is made the works may be constructed and maintained subject to and in accordance therewith. Is there or is there not an implication that so constructed and maintained, the rights and obligations of all parties in relation to these works are left to be regulated by the ordinary law ?

And more general considerations are not without their bearing on the proper answer. It is no doubt true that the Parliament of Canada, for the purpose of securing effective railway administration, may encroach upon the Provincial legislative domain in respect of property and civil rights. Nowhere is this more clearly enunciated than in the case of *Toronto Corporation* v. *Canadian Pacific Ry. Co.* (1) But a reference to the Railway Act shows how sparingly this power has there been exercised by that Parliament, while no instance of a delegation of this legislative power to the Commissioners, a purely administrative body, has been shown nearer than s. 34, sub-s. 3, if indeed that be such an instance. To discover this delegated power disguised in the authority given to the Commissioners to impose the terms and conditions referred to in this section is as matter of construction a difficult quest. Nor is such a delegation readily to be presumed from the nature of the case. The particular section of a wire or cable to which the Commissioners' authority is limited is in most cases a mere fraction of its entire length even when carried along a railway; it is probably always so when carried across. Moreover, there are or may be in immediate juxtaposition to the wire or cable in question other similar wires or cables to which the Commissioners' terms and conditions have no application—the cables and wires of the railway company itself, for example. It is perhaps not an easy presumption that the Commissioners are by these indecisive words empowered to innovate upon the common law with reference to the fractions of wires or cables authorized by them and constructed and maintained in accordance with their order, leaving to be governed by that common law simpliciter, these very wires and cables throughout the rest of their course and even as they pass along and across the railways those other wires and cables over which they have no power.

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(1) [1908] A. C. 54, 58.

In this connection the consideration of another section of the Railway Act, analogous in its provisions to s. 372, and referred to in the minority judgment of the Supreme Court is not irrelevant. By s. 273 the Commissioners may, upon the application of any landowner, order the railway company to provide and construct a suitable farm crossing across the railway wherever in any case the Board deems it necessary for the proper enjoyment of his lands, and the Board may order and direct—the words are in substance identical with those of s. 372—" how, when, where, by whom and upon what terms and conditions such farm crossing shall be constructed and maintained." Rinfret J. in his judgment, concurred in by Cannon J., asks with force whether it could be suggested that by these expressions Parliament intended to empower the Board to impose conditions of civil liability upon the farmer as a result of using the farm crossing. The negative answer is in the case of that section reinforced by the fact that Parliament itself in specific terms, and not by delegation, prescribed the extent of that civil liability: see s. 386. In the case of the cables and wires referred to in s. 372, Parliament apparently considered that no special enactment as to liability was necessary.

As already suggested, one instance of delegated authority may possibly be found in s. 34. If it be one, it is useful to note the terms in which it is conferred and the qualification to which it is subject: " Sect. 34 (3.).—The Board may by regulation or order provide penalties when not already provided in this Act to which every company or person who offends against any regulation or order made by the Board shall be liable. (4.) The imposition of any such penalty shall not lessen or affect any other liability which any other company or person may have incurred."

Their Lordships have dealt at length with the construction placed on the condition by the appellants, because much of the argument was directed to the matters which have so far been alluded to. But it is not necessary for them to determine in this case whether if the amended condition had to be construed as the appellants seek to construe it, it would be one beyond the Commissioners' powers. It is enough for their Lordships to say that in their judgment the construction placed upon the condition by the appellants is not its true construction: its true effect raises different questions altogether, and it is upon them that the decision of the Board must depend.

Condition 2 does not, they think, impose upon applicants, as is contended by the appellants, a liability in the nature of insurance to the world in general for damage brought about by the mere existence of the authorized works. The condition imposes no liability to the outer world at all. It is a clause of indemnity to the railway company only against any loss or damage that company may sustain and against any expense to which it may be put in meeting any claim against it by third parties by reason of the existence of the authorized works, such claim being maintainable against the company by the general law. The question is whether a condition, so construed, for such their Lordships think is its true construction, is within the competence of the Commissioners.

It having been strongly contended during the attack on the condition that the expression "terms and conditions" in s. 372 does not extend to conditions pecuniary or compensatory in character, it was thrown out by one of their Lordships in the course of the argument that that difficulty might possibly be met, if there were read into s. 372, s. 39 of the Act, where "terms and conditions" are actually so described. And the suggestion was taken up by counsel on both sides.

The section is as follows: "39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision the same shall be provided, constructed, reconstructed, altered, installed operated, used and maintained. 2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when the cost and expenses of providing, constructing, reconstructing, altering, installing and executing such structures, equipment, works, renewals or repairs, or of the supervision, if any, or of the continued operation, use or maintenance thereof, or of otherwise complying with such order shall be paid."

Their Lordships are struck by the possibility of reading the two sections together—that is to say, treating s. 39 as supplementary to s. 372. But not being, as they find, required to take that course in order to reach the conclusion at which, on the whole case, they have arrived they refrain on the present occasion from expressing any opinion upon the question whether it is open to them. Two compelling reasons actuate them in their reserve.

First of all, s. 39 has not been relied upon or even referred to in the proceedings as in any way affecting the present question, either by the Commissioners or by the majority of the Supreme Court or even by the respondents. On the contrary, both by the Commissioners and by Duff J. in his judgment, s. 372 is treated as the only section of the Railway Act in which the relevant powers of the Commissioners are to be found, and the one reference to s. 39 is made by Rinfret J. in his dissenting judgment in the Supreme Court, where treating the section as clearly having no application to cases under s. 372 he relies upon the difference in the phraseology of the two as a justification for his view that the result which might follow where, as in s. 39, the relevant words are " terms and conditions as to payment of compensation or otherwise " does not follow in cases under s. 372, where the words " terms and conditions " are used alone. But further, the question of the relation of s. 39 to other sections of the Act—to s. 272 already referred to, for example—raises considerations of wide importance as well as of difficulty upon which their Lordships would, unless so compelled, hesitate to pronounce until after these topics had been raised and fully considered in the Canadian Courts. Except with such assistance they would, for example, hesitate to express any opinion upon the question arising under this very s. 372—namely, whether by the inclusion in that section of so many of the provisions of s. 39 with variations appropriate, as may be suggested, to the particular subject being dealt with, the legislature has not " otherwise expressly provided " for these matters so as to exclude with reference to them the application altogether of s. 39.

But, their Lordships, without any reference to s. 39, have reached the conclusion that treating the amended condition as a term or condition within the meaning of s. 372, alone it is not beyond the powers of the Commissioners. The condition, as they read it, amounts to no more than this, that it is to be a term of permission granted to an applicant to carry his wires and cables along or across a railway that he shall save the railway company harmless from their presence there. It is a provision which their Lordships think would in a serious case quite naturally be embodied in a contract between the two parties where the works resulted from agreement between them, and they see no sufficient reason why, within their powers under the section, the burden should not, where the Commissioners think fit, be imposed by them upon a successful applicant. Its propriety in any particular case is a question for them. It is with its legality when imposed that their Lordships are alone concerned ; and when construed as they have construed it, their Lordships think that to the legality of the condition no effective objection is forthcoming.

In the result, therefore, their Lordships are in accord with the answer returned by the Supreme Court to the question propounded for its consideration. They will accordingly

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humbly advise His Majesty that this appeal be dismissed. There will be no order as to its costs.

Solicitors for appellants : *Lawrence Jones & Co.*
Solicitors for respondents : *Blake & Redden.*

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[PRIVY COUNCIL.]

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*July* 10.

PEARL ASSURANCE COMPANY, LIMITED . . . . . . . . . APPELLANTS ;

AND

GOVERNMENT OF THE UNION OF SOUTH AFRICA . . . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AFRICA, APPELLATE DIVISION.

*South Africa—Roman Dutch Law—Breach of Contract—Stipulated sum payable on breach—Penalty—Damages—Onus of proof.*

Under Roman Dutch law as applied in South Africa, a declaration in an action to recover the sum named in a contract as payable upon its breach is not open to exception, although the stipulated sum is a penalty and the declaration does not allege damage; but the plaintiff can recover only the amount of damages, not exceeding the stipulated sum, which he proves that he has suffered; the onus is not upon the defendant to prove that the plaintiff has suffered no damage, or damages less than the penalty.

The question whether the stipulated sum is a pre-estimate of damages, recoverable without proof of damage suffered, or a penalty, depends upon the intention of the parties exhibited in the contract.

Consideration of the history and development of Roman Dutch law in South Africa with regard to penal stipulations in contracts.

Judgment of the Supreme Court of South Africa, S. A. L. R. [1933] A. D. 277, affirmed; but view of the majority upon the onus of proof disapproved.

* *Present:* VISCOUNT SANKEY L.C., LORD TOMLIN, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, and SIR LANCELOT SANDERSON.

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APPEAL (No. 93 of 1933) by special leave from a judgment of the Appellate Division of the Supreme Court of South Africa (April 25, 1933) affirming a judgment of the Transvaal Provincial Division of that Court (December 24, 1932).

By an agreement made in 1918 between the respondent Government and certain contractors, the latter were required to give a guarantee for 10,000*l.*, and that sum was to be paid to the Government as liquidated damages in the event of the contractors' "failure to carry out all and several the obligations imposed upon them by this agreement." The appellants, the Pearl Assurance Company Ld., bound themselves as guarantors for 10,000*l.* for the due fulfilment of the agreement. On December 31, 1931, the contractors repudiated the agreement, and their business was subsequently sequestrated as insolvent.

On June 2, 1932, the respondent Government brought an action in the Transvaal Provincial Division of the Supreme Court against the appellants. By their declaration they claimed (1.) the stipulated sum of 10,000*l.* as and for liquidated damages, or (2.) alternatively, the said amount as and for damages; particulars of damages amounting to over 27,000*l.* were given in the declaration.

The appellants filed an exception demurring to the declaration upon the ground that it was bad in law and disclosed no cause of action.

The Transvaal Provincial Division dismissed the exception so far as it related to claim (1.) upon the ground that the sum was an agreed pre-estimate of damages recoverable upon proof of breach, but upheld the exception so far as it related to claim (2.). Each party appealed to the Appellate Division against that part of the decision which was against its contention; but the Government withdrew its appeal, so that the first claim alone remained operative.

The Appellate Division unanimously held that the sum stipulated in the agreement was a penalty; but that the appellants' exception failed, because an action for a penalty could be maintained although no damage was alleged. The learned judges differed, however, as to the onus of proof.

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Wessels C.J., upon a consideration of the Roman Dutch commentators and the reported South African cases, held that a plaintiff suing for a penalty could recover the stipulated amount unless the defendant satisfied the Court that the amount was excessive, and that it was only if the defendant did so that the plaintiff was called upon to prove the actual damage which he had suffered. He was of opinion that the question of the initial onus of proof did not arise, and was not considered by the Judicial Committee in *Commissioner of Public Works* v. *Hills*. (1) Stratford J.A., on the other hand, held that a plaintiff suing upon a penalty clause could recover only the actual damages proved by him, not exceeding the amount of the penalty, and that under Roman Dutch law as now applied in South Africa there was no onus upon the defendant to prove that the amount was excessive. De Villiers J.A., in a short judgment, agreed with the Chief Justice. Curlewis J.A. was also a member of the Court but delivered no judgment. The appeal is reported at S. A. L. R. [1933] A. D. 277.

1934. June 2, 3, 5. *Wilfrid Greene K.C.* and *Percival Smith* for the appellants. Although the Appellate Division decided that, as contended by the appellants, the claim was for a penalty, the view of the majority of the Court places upon the appellants the burden of proving the amount of damages suffered by the respondent Government. The appellants contend (1.) that as the claim is for a penalty it is bad in law in the absence of an averment of damage, and (2.) that, if it is not open to exception, the onus is upon the respondent Government to prove the damage which they have suffered. The appellants concede that the Roman Dutch commentators down to about 1800, in dealing with poena, drew no distinction between liquidated damages and a penalty, and placed upon the defendant the onus of proving that the poena was excessive (ingens). But Roman Dutch law as applied in South Africa has been gradually, but fundamentally, modified by the recognition of the distinction between liquidated

(1) [1906] A. C. 368.

damages and a penalty, that distinction depending, as in England, upon the intention of the parties when the contract was made, not upon the damage resulting from a breach. That modification of the law was complete before 1900, and is not compatible with the view expressed by the majority of the Court with regard to the onus of proof. [Reference was made to Wessels' History of Roman Dutch Law, 1908, pp. 386 to 393, as to the influence of English law in South Africa.] The judgment of the Privy Council in *Commissioner of Public Works* v. *Hills* (1) negatived the view that in an action upon a penalty the onus of proving the amount of damages is upon the defendant. The question upon whom was the onus was there raised by the appellants' printed case, as appears from the record ; and the two Transvaal decisions, *Peach & Co.* v. *Jewish Congregation of Johannesburg* (2) and *Davey Paxman & Co.* v. *Langlaagte Star Gold Mining Co., Ld.* (3), which were relied upon by the Chief Justice in the present case, were cited in argument. None of the relevant decisions in South Africa since the date of the above decision of the Privy Council are against the appellants' contention ; several of them support it. The learned Chief Justice distinguished the decision of the Appellate Division in *D. & D. H. Fraser, Ld.* v. *Waller* (4) upon the ground that the contract there was a contract dare not facere, and one to which the principle of stipulatio duplum was applicable ; but the judgments do not suggest that that was the ground of the decision ; nor was the above principle applicable. Further, the two Scottish cases, namely, *Craig & Son* v. *M'Beath* (5) and *Forrest & Barr* v. *Henderson* (6), were misinterpreted, and do not support the view taken by the majority. [Reference was made to the South African decisions mentioned in the judgment of the Judicial Committee ; to Voet, 46.2.4 and 46.3.12, Pothier (Evans' translation, 1806, pp. 207, 209), prin. 4, ss. 342, 345 ; and, as to the development of English law with regard to stipulations as to damages, to 8 & 9 Will. 3, c. 11, s. 8, 4 & 5 Anne, c. 16, ss. 12, 13, and *Wall* v.

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(1) [1906] A. C. 368.
(2) (1894) 1 O. R. 345.
(3) (1898) 5 O. R. 216.
(4) S. A. L. R. [1916] A. D. 494.
(5) (1863) 1 M. 1020.
(6) (1869) 8 M. 187.

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*Rederiaktiebolaget Luggude* (1), per Bailhache J., approved in *Watts, Watts & Co., Ld.* v. *Mitsui & Co., Ld.* (2)]

But the appellants' first contention is that the claim is bad in the absence of an averment of damages ; if that contention is right no question as to the onus of proof arises. The claim was framed in debt, but it is now a claim in damages. It is essential in South Africa, as in England, to plead damages in suing upon a breach of contract : Rules of the Transvaal Supreme Court, r. 28 ; *Philip* v. *Metropolitan & Suburban Ry. Co.* (3) ; *Carter* v. *Campbell & Co.* (4) If the declaration is not demurrable the reason is that it is open to the plaintiffs to prove their damages, not that it is for the defendants to do so.

*Sir William Jowitt K.C.*, *Mackeurtan K.C.*, and *Blanco White* for the respondents. According to the law in South Africa it was open to the plaintiffs to declare upon a penalty without pleading damages. In English law a plaintiff could do so, though in practice he naturally alleged damages in the alternative : Bullen & Leake, 3rd. ed., p. 217. So also in Scotland : *Craig & Son* v. *M'Beath.* (5) In *Commissioner of Public Works* v. *Hills* (6) the claim was for a penalty without an averment of damages, but the Privy Council treated it as valid. In several of the South African cases already referred to the claim was of that nature.

The view of the majority of the Appellate Division with regard to the onus of proof was right. Roman Dutch law formerly did not distinguish between liquidated damages and a penalty, and differed from the law in England in that the date of the breach was looked to in considering whether a poena was enforceable. A poena was recoverable unless it was shown to the Court to be excessive ; it is necessarily for the party who is asking the Court to say that a stipulation is not enforceable so to prove. The law in South Africa adopted the distinction between liquidated damages and a penalty only to the extent of recognizing that liquidated damages was

(1) [1915] 3 K. B. 66, 72.
(2) [1917] A. C. 227.
(3) (1893) 10 S. C. Cape, 52.
(4) [1891] Nat. L. R. 265.
(5) 1 M. 1020.
(6) [1906] A. C. 368.

an admissible classification of poena, but in other respects left the Roman Dutch law upon the subject intact. The view that a stipulation to pay upon breach a reasonable pre-estimate of the damages can be harmonized with Roman Dutch law without difficulty. That law being the law of South Africa (see Proclamation No. 14 of 1902, s. 17, and 9 Ed. 7, s. 135) the Board will not impose a view based upon English law beyond what has been accepted in South Africa. [Reference was made to Voet, 45 . 1 . 12 & 13 ; Bynkershoek, Quaestiones Juris Privati, bk. 2. c. 14 ; and Story on Equity, 3rd ed., s. 1317.] An examination of the South African decisions does not establish acceptance of the complete English law upon the subject. In *Davey Paxman & Co.* v. *Langlaagte Star Gold Mining Co., Ld.* (1), the defendant called evidence to prove that there had been no damage. The decision of the Appellate Division in *D. & D. H. Fraser, Ld.* v. *Waller* (2), properly interpreted, is in the respondents' favour. The decisions of Provincial Courts are not binding upon other Provincial Courts, nor upon the Appellate Division. In *Hills'* case (3) the question of the initial onus of proof did not arise, because it had already been determined that the stipulated sum was a penalty ; it is unlikely that the Board intended to decide the question, as the judgment makes no reference to the commentators nor to the South African decisions. The learned Chief Justice rightly held that it was not open to the defendants to except to the declaration, their proper course being to plead that the amount was excessive, and to prove that at the trial.

Further, upon the principles laid down in the House of Lords in *Dunlop Pneumatic Tyre Co., Ld.* v. *New Garage & Motor Co., Ld.* (4), the stipulated sum was not a penalty but, as the contract stated, liquidated damages.

*Wilfrid Greene K.C.*, in reply, contested the respondents' view of the South African decisions, and referred to *Cloete* v. *Union Corporation* (5) ; he further contended that having

(1) (1898) 5 O. R. 216.
(2) S. A. L. R. [1916] A. D. 494.
(3) [1906] A. C. 368.
(4) [1915] A. C. 79.
(5) S. A. L. R. [1929] T. P. D. 508, 520.

regard to the nature of the contract it was not practicable for the defendants to prove what damages the plaintiffs had suffered.

July 10. The judgment of their Lordships was delivered by

Lord Tomlin. This is an appeal by special leave from an order of the Supreme Court of South Africa (Appellate Division) dated April 25, 1933. The Appellate Division dismissed with costs the appeal of the appellants against that part of an order of the Supreme Court of South Africa (Transvaal Provincial Division), dated December 24, 1932, which had disallowed one branch of an exception taken by the appellants to the respondents' declaration in an action by the respondents, against the appellants.

The facts are as follows: On May 28, 1928, acting under the provisions of the Diamond Cutting Act of 1919, the respondents by the Under Secretary for Mines and Industries entered into an agreement with Rosenstrauch Bros. and Jacques Korbf (hereinafter called "the cutters"), whereby in effect the cutters undertook to set up a diamond cutting industry in the Union and within a period of six months to erect and complete a diamond cutting factory or factories, to provide the necessary machinery therefor, and to conduct all necessary operations in connection therewith. The contract was one for five years. The respondents were to pay substantial subsidies: 15,000*l.* for the first; 10,000*l.* for the second; and 5000*l.* for the third year, and also to provide free second-class steamship accommodation from London or Southampton to a Union port and free railway passages to the place where the factory was to be erected, for expert workmen, not exceeding fifty, to be introduced by the cutters from overseas. Further, the cutters bound themselves to import from overseas expert workmen, to provide the necessary machinery, including forty polishing mills, to train in their factory one hundred apprentices, who should be Union nationals, for the first year, an additional hundred for the second year, one hundred and fifty for the third year and one hundred and fifty for the fourth year, that is 500 in all of such apprentices in four years, and to pay them wages as set out in the agreement. By clause 14 of the agreement the cutters undertook upon the signing of the agreement to deposit with the respondents a guarantee of 5000*l.* (five thousand pounds) and, if called upon by the Minister of Mines and Industries, to lodge within six weeks after ratification of the agreement a further guarantee to his satisfaction in a further sum not exceeding 5000*l.* (five thousand pounds) which guaranteed sums were to be considered as liquidated damages and to be paid to the respondents in the event of the cutters' failure to carry out all and several the obligations imposed upon them under the agreement.

The agreement was ratified by Parliament on June 1, 1928, and the full guarantee up to 10,000*l.* was called for by the Minister under clause 14 of the agreement.

The cutters, in order to fulfil their obligations under clause 14 of the agreement, arranged with the appellants for the latter to give to the respondents the guarantee next hereinafter mentioned.

On November 6, 1929, the appellants gave to the respondents a guarantee for 10,000*l.* to satisfy clause 14 of the agreement. It was in the form of a letter by the appellants addressed to the Secretary for Mines and Industries and reads as follows :—

" Referring to the Agreement dated May 28, 1928, between the Government of the Union of South Africa and Rosenstrauch Bros. and Jacques Korbf, for the establishment of a diamond cutting industry in the Union we beg to state that we, Pearl Assurance Company, Limited, hereby bind ourselves as sureties in solidum for the sum of 10,000*l.* (ten thousand pounds sterling) for the due fulfilment of the said Agreement.

The said sum or portion thereof is payable upon our receiving written demand from you, that such sum or portion thereof is due and payable in terms of our guarantee.

This surety bond shall continue and be binding on us for a period of four years from this date. It is not negotiable nor transferable and should be returned as soon as the terms of the said Agreement have been fulfilled."

After the execution of the agreement, the cutters proceeded to erect a factory, but on December 31, 1931, they repudiated the agreement and closed down the factory. In March, 1932, the business of the cutters was sequestrated as insolvent by the Supreme Court of South Africa.

On June 2, 1932, the respondents commenced an action against the appellants, and in the declaration claimed against the appellants as guarantors: (i.) the stipulated sum of 10,000*l.* as and for liquidated damages, (ii.) alternatively, damages up to 10,000*l.*, particulars of damages amounting in all to 27,559*l.* 3*s.* 11*d.*, being set out in para. 10 of the declaration.

On June 21, 1932, the appellants filed an exception to the declaration on the ground that it was vague, embarrassing and bad in law and disclosed no cause of action.

The exception was heard in the Transvaal Provincial Division of the Supreme Court of South Africa, by De Waal J.P. and De Wet J., on October 25 and 26, 1932, and on December 24, 1932, the Court, for reasons which will presently be stated, dismissed with costs the exception in so far as it related to the first claim for the stipulated sum of 10,000*l.* as and for liquidated damages, but upheld with costs the exception in so far as it related to the alternative claim for particular damages.

As to the alternative claim the respondents subsequently entered a cross-appeal against the judgment of the Court of first instance, but thereafter withdrew such cross-appeal. The declaration therefore stands as though the particulars and the alternative claim were struck out.

The appellants appealed to the Supreme Court of South Africa (Appellate Division) against the order in so far as it related to the first claim for the stipulated sum of 10,000*l.*, and this appeal was dismissed. Against that dismissal the appellants have appealed to His Majesty in Council.

Before dealing with the problems with which this case is concerned, their Lordships think it well to call attention to certain considerations which in their view should be borne in mind in dealing with such a matter as this.

In the first place, the questions to be resolved are questions

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of Roman Dutch law. That law is a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organized society.

That those principles are capable of such adaptation cannot be doubted, and, while it would be idle to assert that the development of the Roman Dutch law in the territories now constituting the Union has not been affected appreciably by the English law, yet in their Lordships' judgment, approach should be made to any question governed by Roman Dutch law without any fetter imposed by recollections of other systems, and through the principles of Roman Dutch law alone.

The fact that the solution of a particular problem reached by the Roman Dutch law bears a similarity to the solution provided by another system does not necessarily indicate any imposition of the rules of one system upon the other, but may be cogent evidence of a resemblance between the relevant basic principles of the two systems.

In the next place their Lordships would observe that on procedural questions their Lordships would always be reluctant to differ from the conclusions arrived at by the Courts on the spot.

Now the questions which have been debated before their Lordships' Board are three in number—namely: (1.) Whether the stipulated sum sought to be recovered by the respondents from the appellants as the guarantors thereof in the name of liquidated damages and described as liquidated damages in the principal contract between the respondents and the cutters is an agreed pre-estimate of damage, or a penalty. (2.) Whether if it is a penalty the declaration which, as matters now stand, contains no allegation of damage is demurrable in the absence of any plea of damage, and (3.) If the declaration is not demurrable whether the onus is on the appellants to prove that the respondents' damages are nothing or less than the penalty or whether it is for the respondents to prove what damage has in fact been suffered.

The Supreme Court of South Africa (Transvaal Provincial

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Division) upon the exception so far as it failed held that the sum was an agreed pre-estimate of the damage recoverable and that therefore upon proof of breach by the cutters the respondents were entitled to succeed.

Upon appeal to the Appellate Division the Court unanimously held that the stipulated sum was a penalty, but that the exception failed because the claim for the stipulated sum without a plea of damage was sufficient even if the sum was a penalty. The majority of the Court, however (Wessels C.J. and de Villiers J.A.) also adopted the view that it was for the appellants to plead and prove that the respondents had suffered no damage or damage less than the penalty before any onus came to lie upon the respondents at all, while the third judge, Stratford J.A., held that though it was enough for the respondents to claim the sum without alleging damage, it was for the respondents to prove the damage actually suffered and that the damage so proved, not exceeding the agreed sum, could be recovered.

Upon the first question the Appellate Division were in their Lordships' judgment clearly right. Indeed the contrary was but faintly argued.

The second of the above questions appears to their Lordships to be in the main a question of local procedure, and their Lordships are not prepared to differ from the view taken below which attributes to such a pleading as this by implication an allegation of damage. The third question is of general importance, and involves a broad consideration of the way in which "poena" has been from time to time regarded and dealt with under the Roman Dutch law.

Among the writers of authority there were marked differences of opinion upon this topic—Dumoulin adhered to the view that a "poena" stipulated in case of non-performance of an obligation might, when excessive, be reduced and moderated by the judge, differing in this respect from the doctrine which had long before been expressed by Azo to the effect that a conventional penalty is not subject to moderation.

The view of Dumoulin was approved by Pothier (Evans' translation, 1806, vol. i., pp. 209 et seq.) and Voet (45.1.13) says "sed & si non voluntaria verum necessaria poenae stipulatio sit," then the proctor has power to reduce the penalty.

Van Bynkershoek (Quaestiones Juris Privati, bk. 2, c. 14) states the position in what is perhaps the most logical form. After a somewhat contemptuous reference to Dumoulin and others, he says: "it is safer and better to follow the Roman law and to hold that penalties in contracts for doing or not doing something were invented for no other purpose than to provide that the measure of damages should not be uncertain and that provided we observe the qualifications laid down in Justinian's decree (Cod. de Sentent. quae pro eo quod interest prof.) there is nothing to fear from such pacts. He adds later, however, that if a penalty clause in a contract is vastly in excess (longe et late excedat) of any real loss which the stipulator may suffer, then the decree referred to must be strictly observed, that is to say, the assessment of damages must be left to the judgment of the Court, but subject to this limitation, that if the matter is of a fixed and definite value the damages shall not exceed another similar sum, but if the matter is of uncertain and doubtful value, the damages shall not exceed the actual value to the stipulator, that is, they shall be limited to the loss sustained, but shall not include the profits which have been lost."

These differing and not always consistent opinions arise no doubt from a common desire to reconcile the application of two conflicting principles recognized by the Roman Dutch law—namely, the principle that a man should be held to his bargain and the principle that one man should not be allowed oppressively to enrich himself at the expense of another.

Now, it is to be observed that all the writers who favour the Court's power of reducing the "poena" make the test of its reducibility, that is the test whether it is "ingens" or not, the amount of the damages actually resulting from the breach. By none is it suggested that in the intention of the parties as exhibited by the contract is there to be found any guide as to the reducibility of the poena.

The view of Van Bynkershoek seems to have been adopted

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and applied by the Supreme Court of the Cape of Good Hope in the early part of the last century in such cases as *Steytler* v. *Smuts* (1) and *Borradaile & Co.* v. *Muller* (2), and it is not until much later that there is found to be a change of usage and the intention of the parties as expressed in the contract is taken into account. In *Cape Town Town Council* v. *Linder* (3) de Villiers C.J. says: "Now there is a strong disinclination in our law to allow one person to be enriched at the expense of another and where a stipulation of this kind [i.e., a penalty clause] is inserted in a contract the Court will inquire carefully in each case whether it has been inserted as a penal stipulation or as compensation for damages. In the present case there is no doubt whatever that the sum was to be paid as a penalty. The words are: 'Shall forfeit the penalty of 500*l.*' . . . . Well then if this clause was intended as a penal stipulation, I am of opinion that the plaintiffs cannot recover without proof of damage." This change was perhaps due in part at any rate to the necessity of stressing the principle of the sanctity of contracts as the conditions of society become more highly organized and complex.

In the Transvaal, the cases of *Peach & Co.* v. *Jewish Congregation of Johannesburg* (4) and *Davey Paxman & Co.* v. *Langlaagte Star Gold Mining Co., Ld.* (5), show that the idea of two categories, namely, (1.) a pre-estimate of damage and (2.) a penalty, differentiated by reference to the intention of the parties expressed in the contract, is being gradually developed, though the necessary corollary that if this classification is adopted it follows that a sum falling within category (1.) will be irreducible has not yet been fully appreciated or accepted (see judgment of Gregorowski C.J. in the latter case). That the categories are to be determined by the intention of the parties seems to have been fully recognized later in *Mann & Harris* v. *Cohen.* (6)

In Natal it seems plain that prior to 1906 the two categories mentioned above had come to be recognized, though there were

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(1) (1833) 1 Menzies, 40.
(2) (1832) 1 Menzies, 55.
(3) (1889) 6 S. C. Cape, 410, 412.
(4) (1894) 1 O. R. 345.
(5) (1898) 5 O. R. 216.
(6) (1902) H. C. Trans. 261.

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still those who thought that a sum intended to be a pre-estimate of damage could still be scaled down if shown to be ingens : see *Searra & Ferrandi* v. *Durban Fishing Co.* (1) and *Bartholomew* v. *Johnson* (2), and *Chaffer & Tassie* v. *Richards.* (3)

In this position of affairs the case of *Commissioner of Public Works* v. *Hills* (4) came before their Lordships' Board on appeal from the Supreme Court of the Cape of Good Hope. There the amount claimed was held below, and by their Lordships' Board, to be on the construction of the agreement not a genuine pre-estimate of loss, but a penalty recoverable only on proof of damage and only to the extent of the damage proved. The Supreme Court held there was no proof of damage. Their Lordships' Board thought that a further opportunity of proving damage should be given.

Their Lordships' attention has been called to the fact that in the printed reasons of the appellants in *Hills'* case the point as to onus of proof discussed in the present appeal was raised. The decision of the Board seems in their Lordships' opinion to proceed upon the basis that in the Cape of Good Hope the Roman Dutch law had then come to recognize only the two categories already mentioned ascertained by reference to the intention of the parties as exhibited in the contract, with the result that a sum which did not fall into the category of pre-estimate of damage could not be recovered unless and only to the extent to which damage was proved.

Subsequent decisions in South Africa seem to be consistent with this view, and to correspond with the experience in the Transvaal to which Stratford J. refers in his judgment. In none of them is there any trace of any classification except that of the two categories already mentioned. In *Zietsman* v. *Vorster* (5) the present Chief Justice (then Wessels J.) treated a stipulation for a sum payable on breaches of contract as on true construction of the contract a stipulation for a penalty and held that the claimant must prove damage. To the same effect are *Union Government* v. *Foster* (1) and *Postmaster General* v. *Van Niekerk.* (2)

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(1) (1896) 17 Nat. L. R. 166.
(2) (1901) 22 Nat. L. R. 79.
(3) (1905) 26 Nat. L. R. 207.
(4) [1906] A. C. 368.
(5) S. A. L. R. [1912] T. P. D. 1144.

Finally, in the Appellate Division of the Supreme Court of South Africa, in *D. & D. H. Fraser, Ld.* v. *Waller* (3), Innes C.J. held that a stipulation for the payment of a percentage commission to cover costs of collection in case of default was a penal stipulation and that in respect of a penal stipulation the Court would only award such damage as the claimant had actually sustained. Solomon J.A. delivered judgment to the same effect and de Villiers A.J.A. concurred.

It seems to their Lordships upon this review of the history and development of the Roman Dutch law in South Africa (1.) that that law has, for the purpose of applying the more effectively to modern conditions its own recognized principles, gradually modified its positive rules, so that to-day the field covered by the old "poena" over which the Court could always have exercised a moderating jurisdiction on being satisfied that the poena was excessive, having regard to the actual damage suffered—is now occupied by the two categories already mentioned ascertained by reference to the intention of the parties exhibited in the contract, and (2.) that if the sum claimed falls into the first category of genuine pre-estimate of damage it can be recovered on proof of breach of contract without proof of damage and cannot be reduced, but that if it falls into the second category it is a penalty and actual proved damage (but not exceeding the amount of the "penalty") can alone be recovered in respect of it. The question whether if the damages exceed the penalty the excess can be recovered in other proceedings does not arise for decision.

The respondents have urged that this conclusion is wrong, because, they say, that while the distinction between a genuine pre-estimate of damages and a penalty by reference to the construction of the contract has undoubtedly been introduced into the Roman Dutch law, yet the penalty category remains

(1) S. A. L. R. [1915] C. P. D. 204.

(2) S. A. L. R. [1918] C. P. D. 378.

(3) S. A. L. R. [1916] A. D. 494.

identical with the old poena and can be recovered, unless the person from whom it is sought to be recovered establishes it to be "ingens," and that if this is done, then the claimant can only recover his actual proved loss. This was the conclusion reached by the majority of the Appellate Division.

With all respect to the Chief Justice and the learned judge, who formed the majority, their Lordships think that the conclusion cannot be supported. In their Lordships' judgment, when once the Roman Dutch law departed from its original view of a stipulatio poenae as being a stipulation to pay a sum which was always recoverable unless the Court's moderating jurisdiction was invoked by proof that it was excessive in relation to the actual damage suffered, and adopted the two categories of (1.) pre-estimate of damages and (2.) penalty each ascertained by reference to the intention of the parties as exhibited in the contract, there was no room left for the old poena at all. If it were otherwise there would now be three categories, namely, (1.) a pre-estimate of damage; (2.) a penalty not being poena ingens, and (3.) a penalty being poena ingens, although in that case for practical purposes, there would be no difference between (1.) and (2.), as in neither of these categories could the stipulated sum ever be scaled down.

It is interesting to observe that the Roman Dutch law, viewed in the way in which their Lordships think it should be viewed, exhibits a development in this matter on lines similar to those found in the sister system in Scotland, which, like the Roman Dutch law, originally knew nothing of the distinction between liquidated damages and penalty.

Agreeing as they do with the Court below in regard to the first two questions under consideration their Lordships are of opinion that the Appellate Division was right in disallowing the exception. Having regard however to what has already been said upon the third question, their Lordships think that it will fall to the respondents to prove damage, and to give before trial such particulars thereof (if any) as may be asked for and as the appropriate Court in South Africa may see fit to allow.

In the result, therefore, their Lordships are of opinion that

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the appeal should be dismissed, but in the circumstances without costs on either side. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *W. H. Warne.*

Solicitors for respondents : *Hatchett Jones & Co.*

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[PRIVY COUNCIL.]

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*July* 26.

## *In re* PIRACY JURE GENTIUM.

SPECIAL REFERENCE.

*International Law—Piracy jure gentium—Actual Robbery not an essential element.*

Actual robbery is not an essential element of the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium.

SPECIAL REFERENCE.

An Order in Council, made under s. 4 of the Judicial Committee Act, 1833, and dated November 10, 1933, provided : "The question whether actual robbery is an essential element of the crime of piracy jure gentium, or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium, is referred to the Judicial Committee for their hearing and consideration."

The circumstances in which the Order was made appear from the report of their Lordships.

1934. July 2, 3, 5. *Sir Thomas Inskip A.-G.* (with him *Wilfrid Lewis*) appeared in support of the view that actual robbery was not an essential element.

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* *Present:* VISCOUNT SANKEY L.C., LORD ATKIN, LORD TOMLIN, LORD MACMILLAN, and LORD WRIGHT.

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*Sir Leslie Scott K.C.* (with him *Kenelm Preedy*), representing the Secretary of State for the Colonies, contended to the contrary.

In addition to cases mentioned in the report of their Lordships, counsel referred to *R.* v. *Bonnet* (1); *Reg.* v. *McGregor* (2); *In re Tivnan* (3); *Att.-Gen. for Hong Kong* v. *Kwok-a-Sing* (4); *Republic of Bolivia* v. *Indemnity Mutual Marine Assurance Co., Ld.* (5); and, as to the jurisdiction of the Court of the Admiral, to *Reg.* v. *Keyn* (6); also to Oppenheim's International Law, 4th ed., vol. i., p. 506, and O. E. D. s.v. "Pirate."

Lord Macmillan referred to *Dole* v. *New England Mutual Insurance Co.* (7); and, as to the relation between international law and municipal law, to *Mortensen* v. *Peters* (8) (per Lord Dunedin), on which question counsel referred to *The Zamora.* (9)

July 26. The report of their Lordships was delivered by

VISCOUNT SANKEY L.C. On January 4, 1931, on the high seas, a number of armed Chinese nationals were cruising in two Chinese junks. They pursued and attacked a cargo junk which was also a Chinese vessel. The master of the cargo junk attempted to escape, and a chase ensued during which the pursuers came within 200 yards of the cargo junk. The chase continued for over half an hour, during which shots were fired by the attacking party, and while it was still proceeding, the steamship *Hang Sang* approached and subsequently also the steamship *Shui Chow.* The officers in command of these merchant vessels intervened and through their agency, the pursuers were eventually taken in charge by the Commander of H. M. S. *Somme*, which had arrived in consequence of a report made by wireless. They were brought as prisoners to Hong Kong and indicted for the crime of piracy. The jury found them guilty subject to the following question of law: "Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred." The Full Court of Hong Kong on further consideration came to the conclusion that robbery was necessary to support a conviction of piracy and in the result the accused were acquitted.

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(1) (1718) 15 St. Tri. col. 1231, 1234.

(2) (1844) 1 C. & K. 429.

(3) (1864) 5 B. & S. 645, 687.

(4) (1873) L. R. 5 P. C. 179.

(5) [1909] 1 K. B. 785, 796, 802.

(6) (1876) 2 Ex. D. 63.

(7) (1864) 2 Cliff. 394, 417, 418.

(8) (1906) 8 F. (J.) 93, 101.

(9) [1916] 2 A. C. 77, 91, 92.

The decision of the Hong Kong Court was final and the present proceedings are in no sense an appeal from that Court, whose judgment stands.

Upon November 10, 1933, His Majesty in Council made the following Order: "The question whether actual robbery is an essential element of the crime of piracy jure gentium, or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium, is referred to the Judicial Committee for their hearing and consideration."

It is to this question that their Lordships have applied themselves, and they think it will be convenient to give their answer at once and then to make some further observations upon the matter.

The answer is as follows: "Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium."

In considering such a question, the Board is permitted to consult and act upon a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts and last, but not least, opinions of jurisconsults or text-book writers. It is a process of inductive reasoning. It must be remembered that in the strict sense international law still has no legislature, no executive and no judiciary, though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the League of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question.

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but "hostis humani generis" and as such he is justiciable by any State anywhere: Grotius (1583–1645) "De Jure Belli ac Pacis," vol. 2, cap. 20, § 40.

Their Lordships have been referred to a very large number of Acts of Parliament, decided cases and opinions of jurisconsults or text-book writers, some of which lend colour to the contention that robbery is a necessary ingredient of piracy, others to the opposite contention. Their Lordships do not propose to comment on all of them, but it will be convenient to begin the present discussion by referring to the Act of Henry VIII., cap. 15, in the year 1536, which was entitled "An Act for the punishment of pirates and robbers of the sea." Before that Act, the jurisdiction over pirates was exercised by the High Court of Admiralty in England and that Court administered the civil law. The civilians, however, had found themselves handicapped by some of their canons of procedure, as for example, that a man could not be found guilty unless he either confessed or was proved guilty by two witnesses. The Act recites the deficiency of the Admiralty jurisdiction in the trial of offences according to the civil law and after referring to "all treasons, felonies, robberies, murders and confederacies hereafter to be committed in or upon the sea, etc." (it is not necessary to set out the whole of it), proceeds to enact that all offences committed at sea, etc., shall be tried according to the common law under the King's Commission, to be directed to the Admiralty and others within the realm.

Many of the doubts and difficulties inherent in considering subsequent definitions of piracy are probably due to a misapprehension of that Act. It has been thought, for example, that nothing could be piracy unless it amounted to a felony as distinguished from a misdemeanour, and that, as an attempt to commit a crime was only a disdemeanour at common law, an attempt to commit piracy could not constitute the crime of piracy, because piracy is a felony as distinguished from a misdemeanour. This mistaken idea proceeds upon a misapprehension of the Act. In Coke's (1552–1634) Institutes, part 3, ed. 1809, after a discussion on felonies, robberies, murders and confederacies committed in or upon the sea, it is stated (p. 112) that the statute did not alter the offence of piracy or make the offence felony, but "leaveth the offence as it was before this Act, viz., felony only by the civil law, but giveth a mean of triall by the common law and inflicteth such pains of death as if they had been attainted of any felony etc. done upon the land. But yet the offence is not altered, for in the indictment upon this statute, the offence must be alleged upon the sea; so as this act inflicteth punishment for that which is a felony by the civill law, and no felony whereof the common law taketh knowledge."

The conception of piracy according to the civil law is expounded by Molloy (1646–1690) "De Jure Maritimo et Navali" or "A Treatise of affairs Maritime and of Commerce." That book was first published in 1676 and the ninth edition in 1769. Chapter 4 is headed "Of Piracy." The author defines a pirate as "a sea thief or hostis humani generis who to enrich himself either by surprize or open face sets upon merchants or other traders by sea." He clearly does not regard piracy as necessarily involving successful robbery or as being inconsistent with an unsuccessful attempt. Thus in para. xiii. he says: "So likewise if a ship shall be assaulted by pirates and in the attempt the pirates shall be overcome if the captors bring them to the next port and the judge openly rejects the trial, or the captain cannot wait for the judge without certain peril and loss, justice may be done on them by the law of nature, and the same may be there executed by the captors." Again in para. 14 he puts the case where "a pirate at sea assaults a ship but by force is prevented from entering her" and goes on to distinguish the rule as to accessories at the common law and by the law marine. A somewhat similar definition of a pirate is given by the almost contemporary Italian jurist, Casaregis, who wrote in 1670, and says ("De Commercio," LXIV 4): "Proprie pirata ille dicitur qui sine patentibus alicujus principis ex propria tantum, ac privata auctoritate per mare discurrit depraedandi causa." But in certain trials for piracy held in England under the Act of Henry VIII., a narrower definition of piracy seems to have been adopted.

Thus in 1696, the trial *R.* v. *Joseph Dawson* (1) took place. The prisoners were indicted for "feloniously and piratically taking and carrying away from persons unknown a certain ship called the *Gunsway* . . . . upon the high seas ten leagues from the Cape St. Johns near Surat in the East Indies." The Court was comprised of Sir Charles Hedges, then judge in the High Court of Admiralty, Lord Chief Justice Holt, Lord Chief Justice Treby, Lord Chief Baron Ward and a number of other judges. Sir Charles Hedges gave the charge to the grand jury. In it he said "now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy."

*Dawson's* case was described as the sheet-anchor for those who contend that robbery is an ingredient of piracy. It must be remembered, however, that every case must be read secundum subjectam materiam and must be held to refer to the facts under dispute. In *Dawson's* case, the prisoners had undoubtedly committed robbery in their piratical expeditions. The only function of the Chief Judge was to charge the grand jury and in fact to say to them: "Gentlemen, if you find the prisoners have done these things, then you ought to return a true bill against them." The same criticism applies to certain charges given to grand juries by Sir Leoline Jenkins (1623–1685) judge of the Admiralty Court (1685): see "Life of Leoline Jenkins," vol. 1, p. 94. It cannot be suggested that these learned judges were purporting to give an exhaustive definition of piracy, and a moment's reflection will show that a definition of piracy as sea robbery is both too narrow and too wide. Take one example only. Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was therefore liable to the penalty of death. "That is too wide a definition which would embrace all acts of plunder and violence in degree sufficient to constitute piracy simply because done on the high seas. As every crime can be committed at sea, piracy might thus be extended to the whole criminal code. If an act of robbery or murder were committed upon one of the passengers or crew by another in a vessel at sea, the vessel being at the time and continuing under lawful authority and the offender were secured and confined by the master of the vessel to be taken home for trial, this state of things would not authorise seizure and trial by any nation that chose to interfere or within whose limits the offender might afterwards be found": Dana's Wheaton, p. 193, note 83, quoted in Moore's Digest of International Law (Washington, 1906) Article "Piracy," p. 953.

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(1) (1696) 13 St. Tr. col. 451.

But over and above that we are not now in the year 1696, we are now in the year 1934. International law was not crystallized in the 17th century, but is a living and expanding code. In his treatise on international law, the English textbook writer Hall (1835–94) says at p. 25 of his preface to the third edition (1889) (1): "Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged, and it has been greatly enlarged within the memory of living man." Again another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which Sir Charles Hedges in 1696 could have had no possible idea.

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(1) Reprinted in 8th ed. 1924.

A definition of piracy which appears to limit the term to robbery on the high seas was put forward by that eminent authority Hale (1609–76), in his "Pleas of the Crown" ed. 1737, cap. 27, p. 305, where he states, "it is out of the question that piracy by the statute is robbery." It is not surprising that subsequent definitions proceed on these lines.

Hawkins (1673–1746) "Pleas of the Crown" (1716), 7th ed., 1795, vol. 1, defines a pirate rather differently, at p. 267 (1), "a pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure." This does not necessarily import robbing.

Blackstone (1726–80), book IV., p. 71, states, "the offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there."

East's "Pleas of the Crown" (1803), vol. 2, p. 796, defines the offence of piracy by common law as "committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there." This definition would exclude an attempt at piracy, because an attempt to commit a crime is, with certain exceptions, not a felony but a misdemeanour.

Their Lordships were also referred to Scottish text-book

(1) 8th ed. 1824, p. 251.

writers, including Hume (1757–1838) " Scottish Criminal Law " (1797), and Alison (1792–1867) " Scottish Criminal Law " (1832), where similar definitions are to be found. It is sufficient to say with regard to these English and Scottish writers that, as was to be expected, they followed in some cases almost verbatim the early concept, and the criticism upon them is : (1.) that it is obvious that their definitions were not exhaustive ; (2.) that it is equally obvious that there appears to be from time to time a widening of the definition so as to include facts previously not foreseen ; (3.) that they may have overlooked the explanation of the statute of Henry VIII. as given by Coke and quoted above, and have thought of piracy as felony according to common law whereas it was felony by civil law.

In " Archbold's Criminal Pleading " (28th ed., 1931) will be found a full conspectus of the various statutes on piracy which have been from time to time passed in this country defining the offence in various ways and creating new forms of offence as coming within the general term piracy. These, however, are immaterial for the purpose of the case, because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy jure gentium. When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law. This appears to be recognized in the " Digest of the Criminal Law," by the distinguished writer, Sir James Fitzjames Stephen (1829–94), 7th ed., 1926, p. 102. At the end of the article on piracy it is stated that " it is doubtful whether persons cruising in armed vessels with intent to commit piracies, are pirates or not," but in a significant footnote, it is added that " the doubt expressed at the end of the article is founded on the absence of any expressed authority for the affirmative of the proposition and on the absurdity of the negative."

The Oxford English Dictionary (1909) defines a pirate as "one who robs and plunders on the sea, navigable rivers, etc., or cruises about for that purpose."

It may now be convenient to turn to American authorities, and first of all Kent (1826). In his Commentaries, I. 183, he calls piracy "robbery, or a forcible depredation on the high seas, without lawful authority, and done animo furandi, and in the spirit and intention of universal hostility."

Wheaton writing in 1836, Elements Pt. II., cap. 2, para. 15, defines piracy as being the offence of "depredating on the seas, without being authorized by any foreign State, or with commissions from different sovereigns at war with each other." This enshrines a concept which had prevailed from earliest times that one of the main ingredients of piracy is an act performed by a person sailing the high seas without the authority or commission of any State. This has been frequently applied in cases where insurgents had taken possession of a vessel belonging to their own country and the question arose what authority they had behind them. See the American case *The Ambrose Light.* (1) Another instance is the case of the *Huascar*. In 1877, a revolutionary outbreak occurred at Callao in Peru and the ironclad *Huascar*, which had been seized by the insurgents, put to sea, stopped British steamers, took a supply of coal from one of them without payment and forcibly took two Peruvian officials from on board another where they were passengers. The British Admiral justly considered the *Huascar* was a pirate, and attacked her. See Parl. Papers, Peru, No. 1, 1877.

In Moore's "Digest of International Law" (1906), vol. 2, p. 953, a pirate is defined as "one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it. The pirate is a sea brigand. He has no right to any flag and is justiciable by all."

Time fails to deal with all the references to the works of

(1) (1885) 25 Fed. Rep. 408, 435.

foreign jurists to which their Lordships' attention was directed. It will be sufficient to select a few examples.

Ortolan (1802–1873), a French jurist, and professor at the University of Paris, says (Dip. de la Mer, book 2, ch. 11) "Les pirates sont ceux, qui courrent les mers de leur propre autorité, pour y commettre des actes de déprédation pillant à main armée les navires de toutes les nations."

Bluntschli (1808–81), a Swiss jurist and a professor at Munich and Heidelberg, published, in 1868, "Le Droit International Codifié," which, in art. 343, lays down: "Sont considérés comme pirates les navires qui, sans l'autorisation d'une puissance belligérante, cherchent à s'emparer des personnes, à faire du butin (navires et marchandises), ou à anéantir dans un but criminel les biens d'autrui."

Calvo (1824–1906), an Argentine jurist and Argentine Minister at Berlin, Le Droit International, 3rd ed., vol. 2, p. 285, para. 1134, defines piracy: "Tout vol ou pillage d'un navire ami, toute déprédation, tout acte de violence commis à main armée en pleine mer contre la personne ou les biens d'un étranger, soit en temps de paix, soit en temps de guerre."

An American case strongly relied upon by those who contend that robbery is an essential ingredient of piracy, is that of the *United States* v. *Smith*. (1) Story J. delivered the opinion of the Court and there states "whatever may be the diversity of definitions in other respects, all writers concur in holding that robbery or forcible depredations upon the sea, animo furandi, is piracy." He would be a bold lawyer to dispute the authority of so great a jurist, but the criticism upon that statement is that the learned judge was considering a case where the prisoners charged had possessed themselves of the vessel, the *Irresistible*, and had plundered and robbed a Spanish vessel. There was no doubt about the robbery, and though the definition is unimpeachable as far as it goes, it was applied to the facts under consideration and cannot be held to be an exhaustive definition including all acts of piracy. The case, however, is exceptionally valuable because from p. 163–180 of the report it tabulates the opinions of

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(1) (1820) 5 Wheat. 153, 161.

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most of the writers on international law up to that time. But with all deference to so great an authority, the remark must be applied to Story J. in 1820 that has already been applied to Sir Charles Hedges in 1696, which is that international law has not become a crystallized code at any time, but is a living and expanding branch of the law.

In a later American decision, *United States* v. *The Malek Adhel* (1), "if he wilfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the Act of Congress, as if he did it solely and exclusively for the sake of plunder, lucri causa. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically hostis humani generis."

Having thus referred to the two cases, *Dawson* (1696) and *Smith* (1820), which are typical of one side of the question, their Lordships will briefly refer to two others from which the opposite conclusion is to be gathered.

It will be observed that both of them are more recent. The first is the decision in the case of the *Serhassan Pirates* (2), decided in the English High Court of Admiralty by that distinguished judge, Dr. Lushington (1782–1873), in 1845. It was on an application by certain officers for bounty which, under the statute 6 Geo. 4, c. 49, was given to persons who captured pirates, and the learned judge said (it is not necessary to detail all the facts of the case for the purpose of the present opinion) "the question which I have to determine is whether or not the attack which was made upon the British pinnance and the two other boats constituted an act of piracy on the part of these prahns, so as to bring the persons who were on board within the legal denomination of pirates." He held it was an act of piracy and awarded the statutory bounty. It is true that that was a decision under the special statute under which the bounties were claimed, but it will be noted that there was no robbery in that case; what happened was that the pirates attacked, but were themselves beaten off and captured. A similar comment may be made on the case in 1853 of *The Magellan Pirates* (1), where Dr. Lushington said: "it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes (i.e., robbery and murder), had intended to rob on the high seas, or to murder on the high seas indiscriminately."

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(1) (1844) 2 How. 210, 232.

(2) (1845) 2 W. Rob. 354.

Finally, there is the American case *The Ambrose Light* (2), where it was decided by a Federal Court that an armed ship must have the authority of a State behind it, and if it has not got such an authority, it is a pirate even though no act of robbery has been committed by it. It is true that the vessel in question was subsequently released on the ground that the Secretary of State had by implication recognized a state of war, but the value of the case lies in the decision of the Court.

Their Lordships have dealt with two decisions by Dr. Lushington. It may here be not inappropriate to refer to another great English Admiralty judge and jurisconsult, Sir Robert Phillimore (1810–85). In his International Law, 3rd ed., vol. 1, 1879, he states: "piracy is an assault upon vessels navigated on the high seas committed animo furandi whether robbery or forcible depredation be effected or not and whether or not it be accompanied by murder or personal injury."

Lastly, Hall, to whose work on international law reference has already been made, states, on p. 314 of the 8th ed., 1924, "the various acts which are recognized or alleged to be piratical may be classed as follows: robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use." Possibly the definition of piracy which comes nearest to accuracy coupled with brevity is that given by Kenny (1847–1930), "Outlines of Criminal Law," 14th ed., p. 332, where he says piracy is "any armed violence at sea which is not a lawful act of war," although even this would include a shooting affray between two passengers on a liner which could not be held to be piracy. It would, however, correctly include those acts which, as far

(1) (1853) 1 Spinks E. & A. 81.

(2) 25 Fed. Rep. 408.

as their Lordships know, have always been held to be piracy, that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall put such a case in the passage just cited ; it is clear from his words that it is not less a case of piracy because the attempt fails.

Before leaving the authorities, it is useful to refer to a most valuable treatise on the subject of piracy contained in "The Research into International Law by the Harvard Law School," published at Cambridge, Mass., in 1932. In it, nearly all the cases, nearly all the statutes, and nearly all the opinions are set out on pp. 749 to 1013.

In 1926 the subject of piracy engaged the attention of the League of Nations, who scheduled it as one of a number of subjects, the regulation of which by international agreement seemed to be desirable and realizable at the present moment. Consequently, they appointed a sub-committee of their committee of experts for the progressive codification of international law and requested the sub-committee to prepare a report upon the question. An account of the proceedings is contained in the League of Nations document, C 196, M 70, 1927 V. The sub-committee was presided over by the Japanese jurist Mr. Matsuda, the Japanese Ambassador in Rome, and in their report at p. 116, they state : "according to international law, piracy consists in sailing the seas for private ends without authorization from the government of any State with the object of committing depredations upon property or acts of violence against persons." The report was submitted to a number of nations and an analysis of their replies will be found at p. 273 of the League of Nations document. A number of States recognized the possibility and desirability of an international convention on the question. The replies of Spain, p. 154 ; of Greece, p. 168 ; and especially of Roumania, p. 208, deal at some length with the definition of piracy. Roumania adds, p. 208 : "Mr. Matsuda maintains in his report that it is not necessary to premise explicitly the existence of a desire for gain, because the desire for gain is contained in the larger qualification 'for private ends.' In

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our view, the act of taking for private ends does not necessarily mean that the attack is inspired by the desire for gain. It is quite possible to attack without authorization from any State and for private ends, not with a desire for gain but for vengeance or for anarchistic or other ends." The above definition does not in terms deal with an armed rising of the crew or passengers with the object of seizing the ship on the high seas.

However that may be, their Lordships do not themselves propose to hazard a definition of piracy. They remember the words of M. Portalis, one of Napoleon's commissioners, who said: "We have guarded against the dangerous ambition of wishing to regulate and to foresee everything. . . . A new question springs up. Then how is it to be decided? To this question it is replied that the office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each particular topic." (Quoted by Halsbury L.C. in Halsbury's Laws of England, Introduction, p. ccxi.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.

All that their Lordships propose to do is to answer the question put to them, and having examined all the various cases, all the various statutes and all the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is that stated at the beginning—namely, that actual robbery is not an essential element in the crime of piracy jure gentium, and that a frustrated attempt to commit piratical robbery is equally piracy jure gentium.

Solicitor: *Treasury Solicitor.*

END OF VOL. AND OF APPELLATE SERIES FOR 1934.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1934, will be as follows :—

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6. —— **(BRITISH COLUMBIA)**—*Restraint of Trade—Contract for sale of goodwill of Brewer's licence—Convenant by vendors not to brew beer—Bare covenant against competition—Covenant unlimited in area.*

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7. —— —— *Stock Exchange — Dealings between Brokers—Principal and Agent—Undisclosed Principal—Bankruptcy of Brokers — Action by Trustee in Bankruptcy—Fraud of company—Liability of director.*

Judgment the Court of Appeal of British Columbia, 46 B. C. Rep. 260, reversed. Solloway *v.* Johnson - - **J. C. 193**

**CANADA**—*continued.*

8. —— —— *Supply of electric energy—Contract with Municipality—Construction of Contract—Clause limiting charges—"Similar services."*

Judgment of the Court of Appeal of British Columbia, 47 B. C. Rep. 335, affirmed. Western Power Company of Canada, Ld. *v.* District of Matsqui Corporation - - - - **J. C. 322**

9. —— **(ONTARIO)**—*Bank—Guarantee by married woman—Undue Influence of husband—Onus of Proof—Independent Advice—Innocent Misrepresentation—Avoidance of Contract—Restitutio in integrum.*

Judgment of the Appellate Division [1932] O. R. 516 reversed on the ground of misrepresentation. MacKenzie *v.* Royal Bank of Canada - - - - **J. C. 468**

10. —— —— *Municipal Corporation—By-law—Franchise for supply of gas—Area annexed to adjoining city — Consolidated Municipal Act*, 1903 (3 *Ed.* 7, *c.* 19 ; *Ont.*), *ss.* 24, 56, 566—*Municipal Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 43 ; *Ont.*), *s.* 33.

Judgment of the Court of Appeal for Ontario [1933] O. R. 369 affirmed. United Gas and Fuel Co. of Hamilton, Ld., and Others *v.* Dominion Natural Gas Co., Ld. - - - - - - **J. C. 435**

11. —— —— *Succession Duty—"Gift"—Marriage Settlement—Consideration—Interpretation of Statute—Evolution of Imperial enactment—Succession Duty Act* (*R. S. Ont.*, 1914, *c.* 24), *s.* 7, *sub-s.* 2 (*b*), *amended by* 4 *Geo.* 5, *c.* 10, *ss.* 4, 5.

Judgment of the Court of Appeal [1933] O. R. 617 affirmed on the first point ; on the second, the view of the Court of Appeal disapproved, and that of Garrow J. [1933] O. R. 218 approved. Att.-Gen. for Ontario *v.* Perry - - - - - **J. C. 477**

12. —— —— *Will — Construction — Bequest — Personal Effects—"Including"—Contents of Desk—Choses in Action.*

Judgment of the Court of Appeal for Ontario reversed. Joseph *v.* Phillips **J. C. 348**

**CASES** :—

—— *Att.-Gen. for Ontario* v. *Perry* [1933] O. R. 617, in part affirmed. *See* Att.-Gen. for Ontario *v.* Perry - - - **J. C. 477**

—— *Att.-Gen. for Ontario* v. *Perry* [1933] O. R. 218. Judgment of Garrow J. approved. *See* Att.-Gen. for Ontario *v.* Perry - - - **J. C. 477**

—— *The Bathori* [1933] P. 22, affirmed on a different ground. *See* The Bathori - **J. C. 91**

**CASES**—*continued.*

—— *British Trawlers Association, Ld.* v. *London & North Eastern Railway Company* [1933] 2 K. B. 14, affirmed with a variation.
*See* London & North Eastern Railway Company *v.* British Trawlers Association, Ld. **H. L. (E.) 279**

—— *Broken Hill Proprietary Co.* v. *Latham* [1933] Ch. 373.
Overruled. *See* Adelaide Electric Supply Co. *v.* Prudential Assurance Co. - - **H. L. (E.) 122**

—— *Cameron Lumber Co., Ld.* v. *Mount Royal Assurance Co. and Others,* 47 B. C. Rep. 52, affirmed.
*See* Mount Royal Assurance Co. and Others *v.* Cameron Lumber Co., Ld. - - - **J. C. 313**

—— *Cammell Laird & Co., Ld.* v. *Manganese Bronze and Brass Co., Ld.* [1933] 2 K. B. 141 reversed.
*See* Cammell Laird & Co., Ld. *v.* Manganese Bronze and Brass Co., Ld. - - **H. L. (E.) 402**

—— *Canadian Co-operative Wheat Producers, Ld.* v. *Paterson Steamships, Ld.* Q. R. 55 K. B. 36, affirmed.
*See* Paterson Steamships, Ld. *v.* Canadian Co-operative Wheat Producers, Ld. - - **J. C. 538**

—— *Canadian National Railways and Others* v. *Canadian Electrical Association* [1932] S. C. R. 451, affirmed.
*See* Canadian Electrical Association and Others *v.* Canadian National Railways and Others. **J. C. 551**

—— *Cohen, In re* [1924] Ch. 515, affirmed.
*See* Peat (Sir William) *v.* Gresham Trust, Ld. - - **H. L. (E.) 252**

—— *Dixon* v. *Muckleston* (1872) L. R. 8 Ch. 155, applied.
*See* Abigail *v.* Lapin and Another. **J. C. 491**

—— *Feist* v. *Société Intercommunale Belge d' Electricité* [1933] Ch. 684, reversed.
*See* Feist *v.* Société Intercommunale Belge d'Electricité **H. L. (E.) 161**

—— *Gee* v. *Harwood* [1933] Ch. 712, affirmed.
*See* Pearson *v.* Gee and Others **H. L. (E.) 272**

—— *Gould* v. *Commissioner of Stamp Duties* [1932] N. Z. L. R. 1464, affirmed upon a different ground.
*See* Gould *v.* Commissioner of Stamp Duties - - **J. C. 69**

**CASES**—*continued.*

—— *Government of the Union of South Africa* v. *Pearl Assurance Co., Ld.* S. A. L. R. [1933] A. D. 277, approved, except as to the view of the majority of the Appellate Division upon the onus of proof.
*See* Pearl Assurance Co., Ld. *v.* Government of the Union of South Africa - - **J. C. 570**

—— *J. H. Coles Proprietary, Ld.* v. *Need* 46 C. L. R. (Australia) 470, reversed.
*See* J. H. Coles Proprietary, Ld. *v.* Need - - - - **J. C. 82**

—— *Johnson* v. *Solloway* 46 B. C. Rep. 260, reversed.
*See* Solloway *v.* Johnson **J. C. 193**

—— *Lapin* v. *Abigail* 44 C. L. R. (High Court of Australia) 166, reversed. Judgment of Supreme Court 29 S. R. (N. S. W.) restored.
*See* Abigail *v.* Lapin and Another **J. C. 491**

—— *MacKenzie* v. *Royal Bank of Canada* [1932] O. R. 516, reversed.
*See* MacKenzie *v.* Royal Bank of Canada - - - **J. C. 468**

—— *McMullan* v. *Lochgelly Iron and Coal Co., Ld.* [1933] S. C. 235, affirmed.
*See* Lochgelly Iron and Coal Co., Ld. *v.* McMullan - **H. L. (Sc.) 1**

—— *Manchester Liners, Ld.* v. *Rea, Ld.* [1922] 2 A. C. 74, applied.
*See* Cammell Laird & Co., Ld. *v.* Manganese Bronze and Brass Co., Ld. - - - **H. L. (E.) 402**

—— *Matsqui Corporation (District)* v. *Western Power Co. of Canada* 47 B. C. Rep. 335, affirmed.
*See* Western Power Co. of Canada *v.* District of Matsqui Corporation - - - **J. C. 322**

—— *Norwich Union Fire Insurance Society, Ld.* v. *Wm. H. Price, Ld.* 33 S. R. (N. S. W.) 196, reversed.
*See* Norwich Union Fire Insurance Society, Ld. *v.* Wm. H. Price, Ld. - - - **J. C. 455**

—— *Ottoman Bank* v. *Chakarian* [1930] A. C. 277, distinguished.
*See* Ottoman Bank of Nikosia *v.* Dascalopoulos - **J. C. 354**

—— *Peat (Sir William)* v. *Gresham Trust, Ld.* [1933] Ch. 542, affirmed.
*See* Peat (Sir William) *v.* Gresham Trust, Ld. - **H. L. (E.) 252**

—— *Perth General Station Committee* v. *Ross* [1897] A. C. 470, distinguished.
*See* London and North Eastern Ry. Co. *v.* British Trawlers' Federation, Ld., and Others **H. L. (E.) 279**

**CASES**—*continued.*

—— *Reilly* v. *The King* [1932] S. C. R. 597, affirmed on different grounds.
*See* Reilly *v.* The King **J. C. 176**

—— *Rex* v. *City of London Assessment Committee* [1907] 2 K. B. 764, approved.
*See* Stepney Borough Corporation *v.* John Walker & Sons, Ld. **H. L. (E.) 365**

—— *Rimmer* v. *Webster* [1902] 2 Ch. 163, applied.
*See* Abigail *v.* Lapin and Another **J. C. 491**

—— *Robson, In re* [1891] 2 Ch. 559, distinguished. *See* Joseph *v* Phillips **J. C. 348**

—— *Rothschild* v. *Brookman* (1831) 5 Bli. N. S. 165.
Discussed. *See* Solloway *v.* Johnson - - - - **J. C. 193**

—— *Rudd* v. *Elder Dempster & Co.* [1933] 1 K. B. 566, disapproved in part.
*See* Lochgelly Iron and Coal Co. *v.* McMullan - - **H. L. (Sc.) 1**
Appeal compromised **H. L. (E.) 244**

—— *St. James' and Pall Mall Electric Light Co., Ld.* v. *Westminster Assessment Committee* [1933] 1 K. B. 605, affirmed.
*See* St. James' and Pall Mall Electric Light Co., Ld. *v.* Westminster Assessment Committee **H. L. (E.) 33**

—— *Sharp* v. *Jackson* [1899] A. C. 419, applied.
*See* Peat (Sir William) *v.* Gresham Trust, Ld. - - **H. L. (E.) 252**

—— *Smith* v. *Owners of ss. "Zigurds"* [1933] P. 87, affirmed.
*See* Smith *v.* Owners of ss. "Zigurds" - **H. L. (E.) 209**

—— *United Gas and Fuel Co. of Hamilton, Ld.* v. *Dominion Natural Gas Co., Ld.* [1933] O. R. 369, affirmed.
*See* United Gas and Fuel Co. of Hamilton, Ld. *v.* Dominion Natural Gas Co., Ld. - **J. C. 435**

—— *Vancouver Breweries, Ld.* v. *Vancouver Malt and Sake Brewing Co.* 47 B. C. Rep. 89, reversed.
*See* Vancouver Malt and Sake Brewing Co. *v.* Vancouver Breweries, Ld. - - - **J. C. 181**

—— *Watson Trustees* v. *Wiggins* [1933] 1 K. B. 245, affirmed.
*See* Wiggins *v.* Watson Trustees **H. L. (E.) 264**

**CEYLON**—*Business Names Registration—New Business in own name after registration—Failure to notify change—Suit on contract in respect of new business—Registration of Business Names Ordinance (No. 6 of 1918, Ceylon), ss. 7, 9.*

Judgment of the Supreme Court of Ceylon reversed. David *v.* De Silva - - **J. C. 106**

**CHIEF JUSTICE**—Power to enlarge jurisdiction of magistrate.
*See* Nigeria.

**CHOSES IN ACTION**—Will—Contents of Desk.
*See* Canada (Ontario).

**COAL MINE.**
*See* Master and Servant.

**COMMISSION OF INQUIRY** — Union of Parishes.
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**COMPANY**—Director—Liability for fraud of Company - - - - **193**
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2.—— *Foreign Company—Bonds—Principal and Interest to be paid "in sterling in gold coin of the United Kingdom of or equal to" a specified standard—Legal tender—Coinage Act, 1870 (33 Vict. c. 10), ss. 3, 6—Currency and Bank Notes Act, 1928 (18 & 19 Geo. 5, c. 13), s. 1.*

Feist *v.* Société Intercommunale Belge d'Electricité - - - **H. L. (E.) 161**

—— Shareholders—Income Tax.
*See* Revenue.

3. —— *Shares—Company registered in England—Business exclusively in Australia—English Stockholders—Dividends—Declaration in Australia—Payment—English or Australian Currency.*

*Broken Hill Proprietary Co., Ld.* v. *Latham* [1933] Ch. 373 overruled. Adelaide Electric Supply Co., Ld. *v.* Prudential Assurance Co., Ld. - - **H. L. (E.) 122**

—— Underlease — Forfeiture on Liquidation—Relief.
*See* Landlord and Tenant.

**CONSTITUTION**—New South Wales.
*See* Doyle *v.* Att.-Gen. for New South Wales - - **J. C. 511**

**CONTRACT** — Avoidance—Innocent Misrepresentation.
*See* Canada (Ontario)—Bank.

2. —— Breach — Penalty — Liquidated damages. *See* South Africa.

**CURRENCY**—Employee of Turkish Corporation—Salary in Turkish pounds—Pension based on salary—Employment in Cyprus—Rate of Exchange.
*See* CYPRUS.

2. —— English or Australian.
*See* COMPANY : CYPRUS.

**CUSTOMS AND EXCISE.**
*See* CANADA.

**CYPRUS**—*Currency—Rate of Exchange—Contract with Turkish Corporation—Pension based on salary.*

Judgment of the Supreme Court of Cyprus affirmed. OTTOMAN BANK OF NIKOSIA *v.* DASCALOPOULOS - - - - **J. C. 354**

**DAMAGES FOR ABOLITION OF OFFICE.**
*See* CANADA—CROWN.

**DEATH FROM INJURY.**
*See* MASTER AND SERVANT.

**DEATH DUTIES**—Gift of land.
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2. —— Settlement—Gift.
*See* NEW ZEALAND.

**DERATING.**
*See* RATES AND RATING.

**DIRECTOR**—Liability for fraud of Company.
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**DOCKS**—Access to—Power of Owners to impose conditions.
*See* SHIPPING—DOCKS

**ECCLESIASTICAL LAW**—*Union of Benefices—Disposal of Surplus Revenue—Charge in favour of other Benefices—Union of Benefices Measure,* 1923 [14 *&* 15 *Geo.* 5, *No.* 2] *ss.* 15, 16.

Scheme set aside. *In re* THELNETHAM AND HINDERCLAY BENEFICES - - **J. C. 119**

2. —— —— *Union of Benefices—Report of Commission of Inquiry—Approval by Bishop—Approval subject to Reservation—Chairman of Commission of Inquiry—Union of Benefices Measure,* 1923 [14 *&* 15 *Geo.* 5, *No.* 2], *s.* 3 (*d*) ; *s.* 4, *sub-s.* 1.

Scheme set aside. *In re* EDBURTON AND POYNINGS BENEFICES - - - **J. C. 115**

**ELECTRICAL ENERGY** — Contract for Supply — Construction — " Similar Services " - - - - - 322
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**EQUITABLE ASSIGNMENT.**
*See* SHIPPING.

**EQUITABLE INTERESTS**—Priority—Title to Land — Registration — Transfer absolute in Form, but subject to Mortgage—Omission to enter Caveat —Purchaser for Value.
*See* NEW SOUTH WALES—REGISTRATION OF TITLES.

**EVICTION.**
*See* NIGERIA.

**EXCISE.**
*See* CANADA.

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**FORFEITURE**—Relief—Underlease.
*See* LANDLORD AND TENANT.

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*See* NEW ZEALAND.

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" **GIFT** "—Succession Duty—Marriage Settlement—Valuable Consideration.
*See* CANADA (ONTARIO)—SUCCESSION DUTY.

**GOLD COAST COLONY**—*Tribal Lands—Disputed Area—Arbitration—Award—Evidence—Title—Arbitrary Division.*

Judgment of the West African Court of Appeal reversed. OMANHENE KOBINA FOLI *v.* CHIEF OBENG AKESSE - - **J. C. 340**

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*See* SALE OF GOODS.

**GOODWILL, Sale of.**
*See* CANADA (BRITISH COLUMBIA)

**GUARANTEE** — Married Woman — Undue Influence of Husband—Independent Advice—Innocent Misrepresentation —Avoidance of Contract.
*See* CANADA (ONTARIO)—BANK.

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**INSURANCE (FIRE)**—Lumber—Valuation.
*See* Canada (British Columbia).

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**INTERNATIONAL LAW**—*Piracy jure gentium—Actual Robbery not an essential element.* Piracy Jure Gentium, *In re* - **J. C. 586**

**JUDICIAL COMMITTEE**—Appeals.
*See* Canada; Ceylon; Cyprus; Ecclesiastical Law; Kenya; New South Wales; New Zealand; Nigeria; Victoria.

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**KENYA** — *Account stated — Account with credits and debits—Consideration—Limitation—Statute barred items—Indian Contract Act (IX. of* 1872), *s.* 25, *sub-s.* 3.

Judgment of the Court of Appeal for Eastern Africa affirmed upon a different ground. Siqueira *v.* Noronha - **J. C. 332**

**LAGOS**—Native Law—Native Compound—Eviction.
*See* Nigeria.

**LANDLORD AND TENANT**—*Underlease—Company—Forfeiture on liquidation—Winding-up Order—Action for relief from forfeiture—Action begun within year of commencement of winding-up—Action not heard till after expiration of year—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 1, 2, 10 (*b*).

Decision of the Court of Appeal (reported sub nom. *Gee* v. *Harwood* [1933] Ch. 712) affirmed. Pearson *v.* Gee and Others **H. L. (E.) 272**

**LEAVE TO APPEAL.**
*See* Bankruptcy.

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*See* Victoria.

**LIFE INTEREST**—Power to revoke.
*See* Revenue.

**LOWESTOFT HARBOUR.**
*See* Shipping—Docks.

**LUMBER**—Insurance (Fire)—Valuation.
*See* Canada (British Columbia).

**MANDAMUS**—Breach of public duty—Special statutory remedy.
*See* Rates and Rating.

**MARRIED WOMAN** — Guarantee — Undue influence of husband—Independent advice.
*See* Canada (Ontario)—Bank.

**MARKET.**
*See* Shipping—Docks.

**MASTER AND SERVANT**—*Injury to Servant—Death from Injury—Action by Father for Solatium and patrimonial Loss—Action arising out of and in Course of Employment—Coal Mine—Failure to support Roof—Breach of Statutory Duty—Workmen's Compensation—" Personal Negligence or Wilful Act "—Coal Mines Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49—*Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 29.

Interlocutor of the Second Division of the Court of Session, 1933 S. C. 235, affirmed. Lochgelly Iron and Coal Co., Ld. *v.* McMullan - - - - **H. L. (Sc.) 1**

2. —— *Workmen's Compensation—Injured Workman—Incapacity, total or partial—Probability of obtaining work—" Continuing effects of Injury "—Determination of Employment — Workmen's Compensation Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9, *sub-s.* 4—*Workmen's Compensation Act,* 1931 (21 *&* 22 *Geo.* 5, *c.* 18), *s.* 1.

Order of the Court of Appeal affirmed. Barstow *v.* Ingham's Thornhill Collieries, Ld. - - - **H. L. (E.) 304**

**MISREPRESENTATION, INNOCENT**—Avoidance of Contract.
*See* Canada (Ontario)—Bank.

**MISTAKE OF FACT**—Money paid under—Notice of abandonment
*See* New South Wales—Insurance (Marine).

**MUNICIPAL CORPORATION** — By-law — Grant of right to supply gas.
*See* Canada (Ontario)—Municipal Corporation.

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**NATIVE LAW.**
*See* Nigeria.

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*See* Master and Servant.

**NEW SOUTH WALES** — *Constitution — Validity of Statutes—Legislative Council—Election of Members—Referendum—Submission to Electors—Summons of Members—Constitution Act (No.* 32 *of* 1902; *N. S. W.*), *ss.* 7a, 16, 17a—*Constitution Further Amendment (Referendum) Act (No.* 2 *of* 1930; *N. S. W.*), *ss.* 6 *to* 9—*Constitution Amendment (Legislative Council) Act (No.* 2 *of*

**NEW SOUTH WALES**—*continued.*

1933; *N. S. W.*)—*Constitution Further Amendment* (*Legislative Council Elections*) *Act* (*No.* 5 *of* 1933; *N. S. W.*).

Judgment of the Supreme Court of New South Wales, in Equity, 33 S. R. (N. S. W.) 484 affirmed. DOYLE *v.* ATT.-GEN. FOR NEW SOUTH WALES AND OTHERS - **J. C. 511**

**2.** —— *Death Duties—Gift—Land subject to partnership agreement with Donor—Benefit not referable to gift—Substance not Form—Real Property Act,* 1900 (*N. S. W.*, 1900, *No.* 25), *s.* 42—*Stamp Duties Act,* 1920–1931 (*N. S. W.*, 1920, *No.* 47, *as amended*), *s.* 102, *sub-s.* 2 (*d*).

Judgment of the Supreme Court of New South Wales reversed. H. R. MUNRO AND OTHERS *v.* COMMISSIONER OF STAMP DUTIES **J. C. 61**

**3.** —— *Insurance* (*Marine*)—*Money paid under mistake of fact—Abandonment—Notice of Abandonment—Marine Insurance Act,* 1909 (*No.* 11 *of* 1909; *Commonwealth*), *s.* 68, *sub-s.* 6.

Judgment of the Supreme Court of New South Wales, 33 S. R. (N. S. W.) 196, reversed. NORWICH UNION FIRE INSURANCE SOCIETY, LD. *v.* WM. H. PRICE, LD. - - **J. C. 455**

**4.** —— *Registration of Titles—Conflict of Equities—Transfer absolute in form but intended as security only—Failure to lodge Caveat—Unregistered Mortgagee—Purchaser without notice—Absence of search of register—Transferee with authority to realize—Real Property Act,* 1900 (*N. S. W.*, *No.* 25).

Judgment of the High Court of Australia, 44 C. L. R. 166, reversed. ABIGAIL *v.* LAPIN AND ANOTHER - - - - **J. C. 491**

**NEW ZEALAND**—*Death Duties—Settlement—Gift—Property held as Trustee—Charge on Estate—Debt—Case stated—Admission of Evidence—Death Duties Act,* 1921 (*No.* 21 *of* 1921, *N. Z.*), *s.* 5, *sub-s.* 1; *s.* 9, *sub-s.* 2; *s.* 62.

Judgment of the Supreme Court of New Zealand [1932], N. Z. L. R. 1464, affirmed upon a different ground. GOULD AND OTHERS *v.* COMMISSIONER OF STAMP DUTIES **J. C. 69**

**NIGERIA**—*Jurisdiction—Police Magistrate—Power of Chief Justice to enlarge Jurisdiction—Supreme Court Ordinance* (*Laws of Nigeria,* 1923, *c.* 3), *ss.* 45, 46—*Criminal Procedure Ordinance* (*Laws of Nigeria,* 1923, *c.* 20), *s.* 71.

Judgment of the Supreme Court reversed; convictions and sentences set aside. AKERELE *v.* THE KING - - - - **J. C. 523**

**2.** —— *Lagos—Native Law and Custom—Native Compound—Eviction by Chief.*

**NIGERIA**—*continued.*

Judgment of the Supreme Court of Nigeria affirmed. IDEWU INASA AND OTHERS *v.* SAKARIYAWO OSHODI - - **J. C. 99**

**NOTICE OF ABANDONMENT**—Mistake of fact.
*See* NEW SOUTH WALES.

**NOTICE OF ASSIGNMENT.**
*See* SHIPS AND SHIPPING.

**ONTARIO.**
*See* CANADA.

**PARISH**—Union.
*See* ECCLESIASTICAL LAW.

**PATRIMONIAL LOSS.**
*See* MASTER AND SERVANT.

**PETITION OF RIGHT.**
*See* CANADA—CROWN.

**PIRACY.**
*See* INTERNATIONAL LAW.

**POLICE MAGISTRATE**—Jurisdiction.
*See* NIGERIA.

**POWER OF REVOCATION**—Life interest.
*See* REVENUE.

**PRACTICE**—Appeal—Leave.
*See* BANKRUPTCY.

2. —— Crown Office—Mandamus—Breach of public duty.
*See* RATES AND RATING.

**PREFERENCE**—Fraudulent.
*See* BANKRUPTCY—COMPANY.

**PRINCIPAL AND AGENT.**
*See* CANADA (BRITISH COLUMBIA).

**PRIORITY**—Equitable assignees.
*See* SHIPS AND SHIPPING.

**PRIVY COUNCIL—APPEALS.**
*See* JUDICIAL COMMITTEE.

**PRIZE COURT**—*Enemy ship—Wrongful sinking—Damages—Treaty of Trianon—Construction of Treaty—" Nationals of the former Kingdom of Hungary "—Fiume—Order in Council—Treaty of Peace* (*Hungary*) *Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 11), *s.* 1, *sub-s.* 2.

Judgment of the Prize Court [1933] P. 22 affirmed upon a different ground. THE BATHORI - - - - **J. C. 91**

**PROFITS BASIS.**
*See* RATES AND RATING.

**QUINQUENNIAL VALUATION.**
*See* RATES AND RATING.

**RAILWAY BOARD**—Powers of—Electric lines running along and across railway—Order indemnifying railway company.
*See* CANADA—RAILWAYS.

**RATES AND RATING**—*Derating—Quinquennial Valuation List—Industrial hereditament omitted from Part II.—Rating Authority—Breach of public duty—Party aggrieved—Special statutory remedy—Practice—Crown Office—Mandamus—Union Assessment Committee Act,* 1862 (25 *&* 26 *Vict. c.* 103), *s.* 18—*Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *ss.* 11, 14, 41—*Rating and Valuation (Apportionment) Act,* 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 1; *s.* 4, *sub-s.* 1—*Local Government Act,* 1929 (19 *Geo.* 5, *c.* 17), *s.* 70, *sub-s.* 4.

Order of the Court of Appeal reversed. STEPNEY BOROUGH CORPORATION *v.* JOHN WALKER & SONS, LD. - **H. L. (E.) 365**

**2.** ——*Electricity Supply Undertaking—Sinking Fund provided from Revenue—Valuation of Hereditaments—Profits Basis—Inclusion of Contributions to Sinking Fund—Valuation (Metropolis) Act,* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 4.

Order of the Court of Appeal [1933] 1 K. B. 605 affirmed. ST. JAMES' AND PALL MALL ELECTRIC LIGHT CO., LD. *v.* ASSESSMENT COMMITTEE FOR THE CITY OF WESTMINSTER AND ANOTHER - - - **H. L. (E.) 33**

**RATING AUTHORITY**—Breach of public duty.
*See* RATES AND RATING.

**REFERENDUM.**
*See* DOYLE *v.* ATT.-GEN. FOR NEW SOUTH WALES - - **J. C. 511**

**REGISTRATION**—Business name.
*See* CEYLON.

**REGISTRATION OF TITLE TO LAND**—Equitable interests—Priority—Purchaser without notice.
*See* NEW SOUTH WALES—REGISTRATION OF TITLES.

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